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ABSTRACT

Summarized are 35 current court cases on the legal status of the mentally retarded in terms of the right to treatment, to protection from harm, to just compensation for labor, to education, to fair classification; and in regards to custody and commitment laws. Given for each case is state, title, current status, summary, and analysis. The cases are from the following states: Alabama, Georgia, Florida, Illinois, Massachusetts, Minnesota, Nebraska, Tennessee, New York, Missouri, Washington, D.C., Pennsylvania, California, Colorado, Connecticut, Maryland, Michigan, North Carolina, Wisconsin, Louisiana, Iowa, and Indiana. Also provided are appendixes of publications on the rights of the mentally retarded and a glossary of legal terms. Examples of cases are "Wyatt v. Stickney" (right to treatment) in Alabama; "Townsend v. Treadway, Commissioner, Tennessee Department of Mental Health" (right to just compensation for labor) in Tennessee; and "Mills v. Board of Education" (right to education) in the District of Columbia. (DB)

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# MENTAL RETARDATION and the LAW

## A Report on Status of Current Court Cases

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April 1973

This comprehensive issue of "Mental Retardation and the Law" was prepared to summarize and update material contained in earlier issues and to provide for requests for copies no longer available.

U. S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
Office of Mental Retardation Coordination
Washington, D.C. 20201, U.S.A.

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I. RIGHT TO TREATMENT

ALABAMA: Wyatt v. Stickney, 325 F. Supp. 781; 334 F. Supp. 1341; 344 F. Supp. 373 and 387 (M.D. Ala. 1972). Appeal filed May 12, 1972. Civil Action No. 72-2634 (5th Cir.).

This litigation originally pertained only to Alabama's mentally ill. It began in September 1970 when a budget deficit forced the head of the State Mental Health Department, Dr. Stonewall B. Stickney, to sever a number of employees at Bryce Hospital, one of Alabama's two large mental hospitals. The employees filed suit against the Mental Health Commissioners and Hospital Administrators in Federal District Court protesting their severance without notice or hearing, and alleging that the lay-off threatened the quality of care at Bryce and denied patients their constitutional right to treatment. Ultimately, the professionals found good positions elsewhere, and the controlling issue became the patients' claim to adequate treatment.

On March 12, 1971, in a formal opinion and decree, Judge Johnson held that the patients involuntarily committed to Bryce Hospital because of mental illness were being deprived of the constitutional right "to receive such individual treatment as (would) give each of them a realistic opportunity to be cured or to improve his or her mental condition." Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971). The court gave defendants six months in which to bring treatment at Bryce up to constitutional standards and required them to file a report on their progress. George Dean, attorney for the plaintiffs, said that when the national implications of the suit were realized, it was enlarged to a class action. By motion to amend, granted August 12, 1971, plaintiffs expanded their class to include residents at the other state mental institution and also at Partlow State School and Hospital, a public institution located in Tuscaloosa, Alabama, and designed to habilitate the mentally retarded.

In his order of March 12, Judge Johnson invited the United States to participate in this case as amicus curiae. Subsequently, the Court also granted leave to the American Psychological Association, the American Orthopsychiatric Association, the American Civil Liberties Union, and the American Association on Mental Deficiency to intervene to serve as "friends of the court" and to provide expert assistance. Court granted amici in this case the extraordinary opportunity to participate fully in the proceedings, i.e., to present expert witnesses of their own and to cross-examine the witnesses of other participants in open hearing.

On December 10, 1971, based in part upon a review of defendants' six-month progress report, the Court found that defendants had failed to promulgate and effectuate minimum standards for adequate treatment

and called for a hearing to set objectively measurable and enforceable standards for minimum adequate treatment and adequate habilitation. Wyatt v. Stickney, 334 F. Supp. 1341 (M.D. Ala. 1971).

In preparation for this hearing, plaintiffs and amici toured the Partlow institution in Tuscaloosa with a team of experts, presented testimony on conditions presently existing at Partlow, formulated standards for constitutionally adequate habilitation, and made proposals concerning implementation. Prior to the ordered hearing, plaintiffs, defendants, and amici met to discuss a number of proposed standards and entered into a series of stipulations which were presented to the Court for approval.

A three-day hearing on the mental retardation aspects of this case was held in late February. General expert testimony was offered by Professors Gunnar Dybwad and Ignacy Goldberg, Dr. James Clements, Mr. David Rosen, Dr. Philip Roos, and Ms. Linda Glenn. Much of the three day hearing was devoted to building a factual record which would provide a sufficient case for the grant of extraordinary relief. Partlow State School is a very substandard institution, but as the experts testified, it is no worse than many institutions in some of our largest and richest States. At the close of the testimony the Court, having in its own words "been impressed by the urgency of the situation," issued an emergency order "to protect the lives and well-being of the residents of Partlow." In that order, the Court found that:

> "The evidence . . . has vividly and undisputedly portrayed Partlow State School and Hospital as a warehousing institution which, because of its atmosphere of psychological and physical deprivation, is wholly incapable of furnishing habilitation to the mentally retarded and is conducive only to the deterioration and the debilitation of the residents. The evidence has reflected further that safety and sanitary conditions at Partlow are substandard to the point of endangering the health and lives of those residing there, that the wards are grossly understaffed, rendering even simple custodial care impossible, and that overcrowding remains a dangerous problem often leading to serious accidents, some of which have resulted in deaths of residents." Wyatt v. Stickney, March 2, 1972, unpublished Interim Emergency Order.

The Interim Emergency Order required the State to bring Partlow up to standards which would at least protect the physical safety of its residents. For example, the Order required that immediate changes be implemented to make the buildings fire safe and to control the distribution of drugs. The Court also ordered the State to hire 300 new aide-level employees within 30 days. Judge Johnson ordered the State to forget about Civil Service or "any other formal procedure" that

would delay the hiring. Within 10 days after the Order was made public, more than 1,000 persons had applied for jobs, and the quota was met.

A final order and opinion setting standards for minimum constitutionally and medically adequate treatment, and establishing a detailed procedure for implementation, was handed down on April 13, 1972. These standards include, inter alia, a provision against institutional peonage; a number of protections to insure a humane psychological environment; minimum staffing standards; detailed physical standards; minimum nutritional requirements; provision for individualized evaluations of residents, habilitation plans, and programs; a provision to ensure that residents released from Partlow will be provided with appropriate transitional care; and a requirement that every mentally retarded person has a right to the least restrictive setting necessary for habilitation. The Judge also appointed a seven-member "human rights committee" for Partlow, and included a patient on this committee. The human rights committee "will have review of all research proposals and all rehabilitation programs, to insure that the dignity and human rights of patients are preserved." It will also advise and assist patients who allege that their legal rights have been infringed or that the mental health board has failed to comply with judicially ordered guidelines.

The Court further ordered that a professionally qualified and experienced administrator be hired to serve Partlow State School and Hospital on a permanent basis within 60 days. It further ordered that within six months from the date of his opinion, the State prepare and file with the Court a report reflecting in detail the progress on its implementation. The Court also ruled that reasonable attorney's fees for plaintiffs' lawyers would be awarded and taxed against the defendants and stated that a ruling on plaintiffs' motion for further relief, including the appointment of a master, would be reserved for the future.

The mental retardation part of the District Court's Wyatt opinion contains 49 individual standards or guidelines. It is available from the Office of Mental Retardation Coordination, U. S. Department of Health, Education, and Welfare, Washington, D. C. 20201.

On May 12, 1972, the Alabama Mental Health Board and George Wallace, individually, filed a notice of appeal in this case in the U. S. Court of Appeals for the Fifth Circuit; on May 22, 1972, Defendant Wallace, individually, filed a motion for stay of execution of the District Court's decree pending appeal and a motion for order of modification. On June 26, 1972, the district court denied the motion, noting that " . . . the appeal seems frivolous." Subsequently, on August 15, 1972, the Court of Appeals for the Fifth Circuit recognized the significance of the case and ordered the appeal expedited.

The Fifth Circuit granted the American Psychological Association, American Orthopsychiatric Association, American Civil Liberties Union, American Association on Mental Deficiency, National Association on Mental Health, National Association for Retarded Children, and the American Psychiatric Association leave to participate fully in the appeal as amici curiae on the side of the plaintiffs below. All of these groups were represented by common counsel. Also appearing as amici in favor of affirmance of the district court's order was the U. S. Department of Justice. The Fifth Circuit further granted the States of Texas and Indiana leave to participate as amici curiae on the side of the defendants below (i.e., Governor Wallace and the State of Alabama).

Oral argument was heard on December 6, 1972, for over two hours. Both Wyatt and Burnham (described immediately below) were heard by a three judge panel composed of Judges Wisdom, Bell, and Coleman. As this issue goes to press, the 5th Circuit has not yet issued its opinion. For a full analysis of the appeals argument, see the discussion immediately following the summary of Burnham.

GEORGIA: Burnham v. Department of Public Health of the State of Georgia, 349 F. Supp. 1335 (N.D. Georgia, Aug. 3, 1972), appeal filed August 1973, Civil Action No. 72-3110 (5th Circuit)

This class action, modeled on the lines of Wyatt, was filed on March 29, 1972 before Judge Sydney Smith in the United States District Court for the Northern District of Georgia. Plaintiffs in this suit were or had been patients at one of the six State-owned and operated institutions named in the complaint and operated for the diagnosis, care, and treatment of mentally retarded or mentally ill persons under the auspices of the Public Health Department for the State of Georgia. Defendants in this case are the Department of Public Health, the Board of Health for the State of Georgia, Department and Board members and officials, the superintendents of the six named institutions; and the judges of Courts of Ordinary of the counties of Georgia, which are the courts specifically authorized by Georgia laws to commit a person for involuntary hospitalization. The complaint, which is described more fully in the June 9, 1972 issue of "Mental Retardation and the Law," alleged violations of the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and sought a preliminary and permanent injunction and a declaratory judgment similar to those awarded in Wyatt. Defendants filed an answer to plaintiffs' complaint on April 21, 1972, and moved for summary judgment.

On August 3, 1972, Judge Sidney O. Smith, Jr. granted the defendants motion to dismiss. Although Judge Smith recognized that persons committed to Georgia's mental institutions might have a moral right to

effective treatment, he disagreed with plaintiffs that Georgia was under a legal obligation to provide such treatment. In his opinion, Judge Smith gave two reasons why he lacked jurisdiction to decide the case. Primarily, he found no legal precedent for a ruling that there is a federal constitutional right to treatment. While Judge Smith was aware of the Wyatt decision, he stated, "This court respectfully disagrees with the conclusion reached by that court in finding an affirmative federal right to treatment absent a statute so requiring." Moreover, the court interpreted the Eleventh Amendment to prohibit a federal court from requiring State expenditures in an area controlled by State law. Judge Smith further suggested that treatment of involuntary patients in mental institutions is not a "justiciable issue"--i.e., not an issue capable of definition and resolution by a court. Finally, he indicated that the establishment and policing of individualized treatment cannot be undertaken by a court, and should be left to the discretion of the professionals rendering services.

The Burnham and Wyatt appeals are described on the next pages. These cases were consolidated for argument.

## ANALYSIS OF THE WYATT AND BURNHAM APPEAL ARGUMENTS

For the appeal of the Wyatt case, lawyers for Governor Wallace and the State of Alabama adopted the identical arguments which had persuaded the Georgia court to dismiss the Burnham case. Briefly, the arguments in both the Wyatt and Burnham appeals were as follows:

(1) Both States argued that the adequacy of mental treatment, care and diagnosis afforded involuntarily committed patients in State-supported institutions does not involve a right or immunity protected by the Constitution and laws of the United States. The States' position was relatively simple. Nowhere in the Federal Constitution is the right to treatment expressly provided for. Nor, according to the States, is there any significant legal precedent which interprets the Federal Constitution as implicitly guaranteeing such a right. The defendant States argued that an earlier seminal right to treatment case heavily relied upon by plaintiffs--Rouse v. Cameron (decided by Chief Judge Bazelon of the U. S. Court of Appeals for the District of Columbia)--was based upon explicit language in the District of Columbia statute. Although the Rouse case suggested that absent a statute expressly providing for treatment, a serious constitutional issue would be raised by involuntary confinement of mental patients without treatment, it did not actually reach and decide this issue.

Plaintiffs' response was that there is absolutely no precedent other than the Burnham case itself for the proposition that involuntarily confined patients do not have a right to treatment, and that what little case law there is on the subject strongly suggests that there is such a right. Plaintiffs stressed that there are three basic constitutional provisions which arguably establish a right to treatment:

(a) Due Process--The 14th Amendment states that no person can be deprived of liberty without due process of law. This provision has been interpreted to require that governmental action affecting individual liberties be consistent with "fundamental fairness." Applying the due process clause to the situation of a mentally handicapped person who had been involuntarily confined, the Supreme Court recently stated that the nature and duration of confinement must bear a reasonable relationship to the purpose of his commitment. Since a mentally handicapped person subject to civil commitment is denied the full range of procedural safeguards made available to criminal defendants, and since the mentally handicapped person can be confined for an indefinite term even though he has committed no criminal act, fundamental fairness requires that treatment--and not mere custody--be the necessary quid pro quo for his loss of liberty. As the District Court in Wyatt stated:

> Adequate and effective treatment is constitutionally required because, absent treatment, the hospital is transformed 'into a penitentiary where one could be held indefinitely for no convicted offense.'

(b) Equal Protection of the Laws--The 14th Amendment also prohibits denial to any citizen or group of citizens of equal protection of the laws. Under this Constitutional provision, courts must scrutinize classifications of citizens to assure that such classifications are reasonable. Classifying certain persons as "mentally handicapped" and subsequently depriving them of their liberty is reasonable only if treatment is provided. Even in those States where the mentally ill must also be "dangerous" before commitment is authorized, treatment remains a necessary trade-off for involuntary commitment. If treatment is not afforded, then the entire system of classification is unreasonable and the mentally handicapped are denied equal protection, because they alone are picked out for "preventive detention" while all other dangerous people who have not actually committed criminal acts are allowed to remain free.

(c) Cruel and Unusual Punishment--The 8th Amendment prohibits cruel and unusual punishment. The Supreme Court has held that punishing a sickness as if it were a criminal offense violates this prohibition. Since civil commitment of a mentally handicapped person without treatment amounts to punishing him for his sickness, such commitment violates the 8th Amendment.

A second, more narrowly framed, version of the 8th Amendment argument follows from analogous cases on prison conditions. The conditions in Alabama's mental institutions --the physical deprivation, the lack of basic sanitation, the overcrowding, the lack of physical exercise, the inadequate diet, the unchecked violence of inmates against each other and of employees against inmates, the lack of adequate medical care and psychiatric care, the abuse of solitary confinement and restraint--all bear a close resemblance to conditions which have been held to violate the 8th Amendment in cases involving convicted criminals and persons accused of crime. It follows, therefore, that these conditions would also constitute cruel and unusual punishment for persons who have committed no criminal acts and who are civilly confined because of their mental handicap.

(2) A second string in the States' bow was the argument that the adequacy of treatment of involuntary patients in mental institutions is not a "justiciable issue." The District Court in Burnham had written that the adequacy of treatment issue does not provide "judicially ascertainable and manageable standards." The gist of this position is that vindication of plaintiffs' alleged right to adequate treatment would be so complex and difficult that a court of law should refuse to consider such a complaint and should defer to the discretion of professionals. The defendant States suggested that even experts in the field of mental health delivery could not agree on minimum standards for adequate treatment and that the most reasonable approach under these conditions would be to defer to the individual integrity and discretion of administrators and treatment professionals.

Plaintiffs, and amici on plaintiffs' side, stressed that the task of standard-setting is not so impossible as the District Court in Burnham had suggested. They noted that in the Wyatt case, agreement was reached among plaintiffs, defendants and amici on almost all of the minimum standards for adequate treatment ordered by the District Court. These stipulated standards were supported and supplemented by testimony of numerous expert witnesses. There was a striking degree of consensus among the experts, including defendants' own experts, as to the minimum

standards for adequate treatment. According to plaintiffs, the Wyatt court, with the expert assistance provided by amici, had found it quite possible to develop "judicially ascertainable and manageable standards." Even on the appeal of the Wyatt case, the defendants did not challenge any of the standards of adequate treatment adopted by the District Court, and asked only for a ruling that there was no constitutional right to treatment. According to plaintiffs, the effort to define standards was both possible and successful.

(3) Closely related to the "justiciability" issue was the issue whether voluntarily committed patients alleging inadequate treatment should be required to pursue remedies such as habeas corpus provided by State law on an individual basis, rather than seeking relief in federal court via a class action. The defendant States argued that the establishment and policing of the individualized treatment required by the Rouse case cannot be undertaken by a court. According to the defendant States, a court should not and cannot choose among the vast array of psychotherapies in order to assure that constitutionally adequate treatment is provided. As the States observed, the proper therapy or habilitation plan for one patient or resident might be contraindicated for another.

The plaintiffs and amici countered with the argument that this objection rested upon a misunderstanding of the Wyatt approach. The emphasis in Wyatt had been upon assuring the existence of those conditions which are a prerequisite to any kind of therapy or habilitation--a humane physical and psychological environment, qualified staff in adequate numbers, and individualized treatment plans. Plaintiffs argued that under this approach, the court is not required to choose one specific form of treatment or habilitation over another, but merely assures that there will be a range of adequate treatment or habilitation alternatives available, which persons rendering direct services can choose from. Thus, according to plaintiffs, if the goal is to assure the existence of the preconditions necessary for minimum adequate treatment, rather than adequate treatment itself for a particular resident, a class action is perfectly appropriate.

(4) Another argument against right to treatment class actions put forth by both the State of Alabama and the State of Georgia was that the kind of order rendered by Judge Johnson in Alabama violates the sovereignty of the State guaranteed under the Eleventh Amendment of the Federal Constitution. Assuming that the right to treatment is provided for, if at all, by State statutes and is not to be found in the United States Constitution, the Eleventh Amendment (designed to insure State sovereignty) would

protect the State from having to appear in federal court. Both States appeared to concede that if there were a federal constitutional right to treatment, then a defense by the State that it lacked the necessary financial resources to provide such treatment, would not be acceptable. And both States conceded further that, if the right to treatment were a federal constitutional right, the Eleventh Amendment would not protect the State from being sued in a federal district court, assuming it had denied this right to its residents.

Plaintiffs and amici on the side of plaintiffs argued that the right to treatment was a Federal Constitutional right, and that for this reason the States' Eleventh Amendment argument was invalid.

(5) The States argued further that the kind of decree rendered by Judge Johnson in Alabama constituted a serious and illegal infringement upon the functions of the legislature. For example, the State of Alabama argued that the cost of implementing the minimum standards set forth in the Johnson decree would require capital expenditures of sixty-five to seventy million dollars, a sum equal to more than half of the State's present general fund. The State of Alabama argued further that in usurping a characteristically legislative function, the federal district court had failed to give sufficient consideration or recognition to other equally important demands on the State's revenue, such as the need to provide old age pensions, welfare payments for indigents, the building of modernized highways, etc. Such decisions, according to the State of Alabama, are a matter of policy suitable for legislative rather than judicial determination. Only a legislature can decide whether it is more important to provide a "subsistence pension for elderly having no other income than to provide expensive psychiatric treatment and other services to patients in mental institutions."

The position of plaintiffs on the "invasion of legislative domain" issue drew upon existing precedent from analagous cases in related law areas. Plaintiffs argued that where a basic constitutional right is involved, the case law is clear that lack of adequate funds is not an acceptable excuse. Plaintiffs relied upon cases in the prison area which stress that even convicts are human beings with basic human dignity and prohibit certain kinds of solitary confinement and other extreme deprivations as constituting cruel and unusual punishment. The gist of these cases is that it is entirely up to a State whether to maintain a prison system at all, but once it has decided to run a prison system (or by analogy here, a mental institutional system) it must run it in a way which is consistent with basic constitutional protections.

(6) A last issue, not directly related to the right to adequate treatment, but very important nonetheless for the development of such cases in the future, was whether the attorneys for the plaintiff class in the Wyatt case were entitled to an award of attorneys' fees to be assessed against the defendants. In its order of June 1972, the district court in Wyatt had awarded three lawyers representing the plaintiffs approximately $37,000 for attorneys' fees and expenses incurred in representing the plaintiffs during the previous one and one-half years. According to the State of Alabama, the general rule is that in the absence of a contrary provision of statute or a contrary requirement of applicable state law, the prevailing party in an action in federal court is not entitled to recover counsel fees. Plaintiffs stressed that legal issue is in an evolving stage. They stressed that fees had already been awarded in analogous cases both where a plaintiff acts as "private attorney general" to enforce a strong national policy and where a plaintiff has successfully maintained a suit that benefits a group of others in the same manner as himself. Plaintiffs further argued that there had been "bad faith" on the part of the defendants in denying them their constitutional rights and that this factor had been taken into account in other cases where courts had a awarded attorneys' fees. The essence of plaintiffs' argument, supported by the amici groups on plaintiffs' side, was that since most of the involuntarily committed mentally retarded are cut off by the nature of their problem and their confinement from access to meaningful legal representation, the court should invoke its inherent equity powers to allow attorneys' fees so as to encourage private lawyers to serve as counsel for this otherwise sadly underrepresented group.

FLORIDA: Donaldson v. O'Connor, Civil Action No. 1693 (decided by the Federal District Court in Tallahassee, Florida, on November 28, 1972)

While this case concerns a mentally ill rather than a mentally retarded person, it is included because of its enormous precedential significance. Donaldson is the first case ever in which a former mental patient has been permitted to sue for (and has subsequently been awarded) money damages for being deprived of his liberty without treatment. Prior to this decision, only habeas corpus and injunctive relief have been awarded in such situations. The case survived two motions to dismiss and went to trial on November 28, 1972. After deliberating for two hours and fifteen minutes, a federal court jury in Tallahassee awarded the plaintiff $38,500 damages, to be assessed personally against the Superintendent of his hospital and his treating physician. In its charge to the jury, the court instructed that:

"the burden was upon the plaintiff to establish by a preponderance of the evidence that the defendant doctors confined plaintiff against his will, knowing that he was not mentally ill or dangerous, or knowing that if mentally ill he was not receiving treatment for his alleged mental illness."

The court also instructed the jury:

"that a person who is involuntarily civilly committed to a mental hospital does have a constitutional right to receive such individual treatment as will give him a realistic opportunity to be cured or to improve his or her mental condition."

Finally, the judge instructed the jury that in order to recover, the plaintiff did not have to prove that defendants acted in bad faith or maliciously. He simply had to prove that he was not dangerous, and received only custodial care, all of which was known to defendants.

Defendants have filed an appeal in this case and plaintiffs have asked the Court to assess the costs of trial preparation against defendants.

ILLINOIS: Rivera et al., v. Weaver et al., Civil Action No. 72C135

In this class action plaintiffs sought a declaration that defendants, acting under the color of state law, had deprived and continued to deprive plaintiffs of due process of law by causing them to be transferred to and confined within institutions for the mentally ill and mentally retarded in violation of their constitutional right to adequate placement, care, custody, protection and treatment.

The named plaintiffs (one of whom is mentally retarded) were all juveniles under 18 years of age who continuously resided in Cooke County prior to their transfers to the Elgin State, Chicago-Read, and Tinley Park mental institutions. Each named plaintiff was in the permanent or temporary custody of the Illinois Department of Children and Family Services, and allegedly was subject to the right and duty of that agency to procure for him proper placement, custody and treatment.

The defendants in this action were the Director of the Illinois Department of Children and Family Services; the Director of the Chicago Region of the Illinois Department of Children and Family Services; and the Guardianship Administrator of the Department of Children and Family Services for the State of Illinois.

The complaint alleged that plaintiffs, who suffered from emotional disorders should be discharged from the institutions for the mentally ill and mentally retarded, since their disorders were not so severe as to require hospitalization, but only special care and attention. The plaintiffs sought to have the acts and omissions by the defendants, which had deprived plaintiffs of an adequate level of care, treatment and custody, declared to be in violation of their right not to be institutionalized without due process of law. The plaintiffs further sought an injunction prohibiting defendants from confining plaintiffs and the class they represented in mental institutions unless they were in need of hospitalization.

Plaintiffs in this case dismissed their own district court complaint since virtually the same relief sought was obtained in State court in the case of In the Interest of Mary Lee and Pamela Wesley. A comprehensive August 29, 1972, order gave institutionalized children who were wards of the State the right to leave the institutions, and further affirmed the State's responsibility to secure placement for them. An elaborate system of reporting was set up and the plaintiffs' lawyers were appointed as child advocates for 200 children. They have recently issued a lengthy report to the court in preparation for a possible right to treatment case.

ILLINOIS: Wheeler et al., v. Glass et al., U. S. Court of Appeals, 7th Circuit, Civil Action No. 71-1677.

On November 13, 1970, Robert Wheeler and Dennis Duffee, two mentally retarded youths institutionalized at Elgin State Hospital, filed in Federal District Court a class action complaint pursuant to the Civil Rights Act (42 U.S.C. 1983) seeking declaratory, injunctive, and pecuniary relief for violations of their constitutional rights. The complaint alleges that the defendants by summarily and publicly binding plaintiffs in spread-eagled fashion to their beds for 77½ consecutive hours and forcing them to wash walls for over 10 consecutive hours on more than one occasion in order to punish and humiliate them, have subjected plaintiffs to cruel and unusual punishment and denied them due process of law.

The defendants in this case are the Director of the Department of Mental Health of the State of Illinois, the Acting Executive Director of the Children's and Adolescent Unit, and the Acting Program Coordinator of Halloran West Ward, Elgin State Hospital.

On November 17, 1970, plaintiffs filed a motion for a temporary restraining order and preliminary injunction. On May 4, 1971, and May 7, 1971, defendants filed a motion to dismiss and memorandum in support thereof, respectively, asserting that their revised rules on the use of restraint corrected the alleged abuses and thus rendered the law suit moot. The District Court filed a memorandum opinion on

August 2, 1971, granting the defendants motion to dismiss the complaint. Plaintiffs were granted leave to appeal in forma pauperis on August 11, 1971.

The plaintiffs filed their appeal brief in the U. S. Court of Appeals for the 7th Circuit. The plaintiffs did not appeal from the refusal of the court to grant an injunction inasmuch as the defendants did, in fact, enforce a revised rule governing the use of restraints. Plaintiffs, however, did appeal the dismissal of that portion of the complaint requesting monetary damages. The appeal brief argues that the punishment perpetrated by the defendants upon the plaintiffs without notice and hearing violated the plaintiffs' rights to be free from cruel and unusual punishment and to due process of law, thus entitling them to monetary compensation for the damages they sustained.

This case was argued on October 19, 1972, before a three judge panel of the 7th Circuit. The opinion was handed down on January 18, 1973. It held that the plaintiffs' complaint for pecuniary damages does state a cause of action under the Civil Rights Act--thus reversing the district court's finding.

MASSACHUSETTS: Ricci, et al. v. Greenblatt, et al., Civil Action No. 72-469F (M.D., Mass.)

This is a class action for declaratory and injunctive relief brought on behalf of a number of named plaintiffs, all of whom reside at Belchertown State School, other persons similarly situated, and the Massachusetts Association for Retarded Children. Plaintiffs seek to redress the deprivation, under color of law of the Commonwealth of Massachusetts, of their rights, privileges and immunities secured by the 1st, 5th, 8th and 14th Amendments of the U. S. Constitution. The defendants in this case are the Secretary of Human Services, the Commissioner of Administration, the Commissioner of the Department of Mental Health, the Superintendent of Belchertown State School, and other officials of the State of Massachusetts.

The 46-page complaint in this case sets forth in detail a number of alleged deficiencies which come under the general headings of physical inadequacies, lack of treatment, and inhumane environment. As in the Wyatt case, plaintiffs ask for a declaration from the court that mental retardation is separate and distinct from mental illness; that the rights of the institutionalized mentally retarded are present rights which must be promptly vindicated; that the lack of public funds to remedy substandard conditions is not a constitutionally adequate reason to justify the alleged continued denial of due process to those institutionalized at Belchertown; and that commitment to a substandard facility cannot be truly "voluntary" unless the State has presented the resident with a choice of less restrictive alternatives.

Plaintiffs seek relief similar to that ordered by the District Court in Wyatt v. Stickney.

Simultaneously with the complaint, plaintiffs also filed a motion for a temporary restraining order and for a preliminary injunction. The rationale for such requested orders is to maintain the status quo during the period in which plaintiffs' claims are being litigated. On February 11, 1972, the Court granted plaintiffs' motion and ordered in part:

- That the defendants be prohibited from causing the transfer of any resident of Belchertown State School to any facility for the mentally ill;

- That the defendants not accept for admission any person until such time as a plan for the orderly reduction of the resident population of Belchertown State School can be presented to the Court, together with evidence that all residents at Belchertown receive adequate treatment and enjoy humane living conditions, and until a final disposition is entered;

- That the Secretary of Humane Services direct the agencies under his jurisdiction to make a complete evaluation of the medical needs of each resident within 30 days and present the same to the Court;

- That defendants formulate a comprehensive treatment plan for all residents which will provide for adequate and proper medical, dental, educational, nutritional, physical therapy, occupational therapy, psychological, social recreational, speech therapy and vocational therapy services; and

- That the Commissioner of Administration ascertain within 15 days the specific needs for hygienic and other necessary supplies, equipment and repairs and report such findings to the Court and that the Secretary of Human Services, within 15 days thereafter: (1) formulate a plan to provide necessary supplies and equipment and make necessary repairs; (2) report such plan to the Court; and (3) begin implementation of such plan immediately upon its completion.

In response to a motion by defendants, this injunction was modified by the Court so as to enlarge the time limits for compliance. Defendants filed an answer on April 20, 1972 which contained a number of admissions, and which also denied specific allegations of the plaintiffs' complaint paragraph by paragraph. Plaintiffs have made discovery requests for production of documents pursuant to the

Federal Rules. On the theory that this case is distinguishable from Wyatt because the plaintiffs are on voluntary rather than involuntary status, defendants asked the district court either to dismiss the complaint or to abstain from deciding the case until the State courts had first had the chance to review plaintiffs' claims. This motion was denied.

Judge Ford became ill and this case was reassigned to another District Court Judge, Manuel Real of Los Angeles, in November 1972.

During hearings on plaintiffs' motion for class-action status, one of the plaintiffs' witnesses indicated that a plan formulated by the State of Massachusetts to bring Belchertown up to minimum standards was basically adequate. In light of this testimony, defendants made an oral motion for summary judgment on the basis that the case was moot. The Judge has urged the parties to try to reach a settlement in this matter and has made no rulings to date.

MINNESOTA: Welsh v. Likens, 4-72 Civ. 451 (D. Minn.)

This class action brought on behalf of residents at six state hospitals for the mentally retarded is very similar to Wyatt, with one important exception. In addition to the allegations that defendants have failed to provide plaintiffs with a constitutionally required minimal level of habilitation and with less restrictive alternatives to institutionalization as required by the due process clause of the Fourteenth Amendment to the United States Constitution, plaintiffs also assert that they have been required to work at nonhabilitative tasks in the institutions for nominal wages in violation of the Fair Labor Standards Act, as amended, 29 U.S.C. §201 et seq. Plaintiffs have submitted interrogatories to the defendants and anticipate further pretrial discovery in the immediate future. No trial date has yet been set.

NEBRASKA: Horacek, et al. v. Exon, et al., Civil Action No. CV72-L-299 (United States District Court, Nebraska).

The plaintiffs in this class action suit are five mentally retarded children and adults. All of these plaintiffs have been residents at Beatrice State Home for the Mentally Retarded in Nebraska for one or more years, and it is alleged that the conditions of the plaintiffs have deteriorated since they were initially admitted. Joining the suit with these individual plaintiffs is the Nebraska Association for Retarded Children.

Defendants are Governor James J. Exon, the Director of the State Department of Public Institutions, the Director of Medical Services, the Director of the State Office of Mental Retardation, and the Superintendent of the Beatrice State Home.

This suit is basically modelled on the mental retardation (Partlow School) part of the Wyatt suit, with special emphasis on the right to "normalization" and to treatment in less restrictive environments than institutions. The complaint alleges that the community service programs (pioneered by Wolf Wolfensberger and others in the Nebraska area) are the constitutionally required least restrictive alternative for the habilitation of the mentally retarded in Nebraska. (See appendix).

After the complaint was filed in late 1972, defendants filed a motion to dismiss which was modelled along the lines of the successful motion to dismiss in the Burnham decision (discussion above). The defendants' motion to dismiss was bottomed on the assertion that the complaint failed to state a claim upon which relief could be granted; that the court lacked jurisdiction over the subject matter, since the complaint failed to raise a substantial federal question, and that the complaint failed to present any justiciable issue which could be appropriately adjudicated by the court.

On March 23, 1973 Chief Judge Warren Urbom issued a memorandum and order denying defendants motion to dismiss. The court noted that for the purposes of evaluating the defendants motion to dismiss, the court must determine whether the plaintiffs could prove no set of facts in support of their claim which would entitle them to relief. Taking plaintiffs' allegations as true for the purposes of the motion, the court ruled that plaintiffs had stated at least one claim which is recognized as reviewable under the Civil Rights Act. The allegations that the conditions of confinement at Beatrice State Home are violative of the Eighth Amendment's ban on cruel and unusual punishment were held to fall within the purview of the Civil Rights Act, and the court stated:

> "I cannot say as a matter of law at this stage of the litigation that the plaintiffs will be unable to muster facts in support of their claims that the conditions at the Beatrice State Home are cruel and unusual. At the very least, the plaintiffs should be given an opportunity to offer evidence on this allegation."

The court then went on to state:

> "Recent decisions in this area indicate that the courts differ on the question of whether there is a constitutional right for persons to be given habilitative treatment at state institutions for the mentally retarded, and whether due process, equal protection, or the Eighth Amendment's ban on cruel and unusual punishment entitles such persons to bring their allegations under the Civil Rights Act. Needless to say, the issues presented therein are of a sensitive nature, both as to their

legal and moral overtones, but this memorandum is not fashioned to deal with the possible ramifications of the plaintiffs' theories, since it is enough to say that they should be given an opportunity to present evidence."

One further issue resolved by the court in its memorandum and order of March 23, 1973 is noteworthy. The court observed that parents of certain children residing at the Beatrice State Home have brought this action on behalf of their children. The question had been raised whether the parents of the named plaintiffs are the proper parties to represent the interests of the plaintiffs. As the court held, "I cannot be insensitive to the possibility that the interests of the parents may conflict with those of the children residing at the Beatrice State Home. While the parents in all good conscience may desire one remedy, or specific type or style of treatment for their children, it would not necessarily be in the best interests of the children." For this reason, the court provided for the appointment of a guardian ad litem who would not displace the parents as the representatives of the plaintiffs, but who would be alert to recognize "potential and actual differences in positions asserted by the parents and positions that need to be asserted on behalf of the plaintiffs."

At this same time the court granted the motion to intervene as amicus curiae of the National Center for Law and the Handicapped.

Defendants' motion for leave to file an interlocutory appeal (i.e., an appeal on the legal ruling prior to a full evidentiary hearing) of the District Court's order denying their motion to dismiss has been denied.

TENNESSEE: Saville v. Treadway, Civil Action No. Nashville 6969 (District Court, M.D. Tennessee).

This class action right to treatment suit was filed on April 10, 1973. The complaint has not been received, but plaintiffs' attorney describes the suit as being basically modelled after the Wyatt v. Stickney pattern with two important additions. First, plaintiffs' claim that the state has failed to carry through on planning responsibilities under the Developmental Disabilities Act. And second there is increased emphasis on the right of the mentally retarded plaintiffs to be given habilitation in the least restrictive setting necessary.

No judge has yet been assigned in this case, and no responsive pleadings have been filed by defendants.

II. RIGHT TO PROTECTION FROM HARM

NEW YORK: New York State Association for Retarded Children, et al. v. Rockefeller, 72 Civil Action No. 356 (E.D., N.Y.); and Patricia Paresi, et al. v. Rockefeller, 72 Civil Action No. 357 (E.D., N.Y.) (both filed March 17, 1972).

Memorandum and Order on Motion for Preliminary Injunction filed April 10, 1973.

In a recent memorandum and order on plaintiffs' motion for preliminary injunction, Judge Judd has declined to rule that mentally retarded residents of Willowbrook have a constitutional right to adequate habilitation. He has, however, found that they have a constitutional right to be free from harm, and he has ordered appropriate relief. This important opinion, which is ninety pages in length, will be analyzed in a future issue of "Mental Retardation and the Law." In the interim, the history of the case and the most salient features of Judge Judd's recent memorandum are summarized below.

The first of these two suits was filed by the New York Civil Liberties Union, the Mental Health Law Project, and the NLADA National Law Office on behalf of the New York State Association for Retarded Children, two of its chapters and eight parents of children who are residents of Willowbrook. The suit was filed on March 17, 1972 in the United States District Court for the Eastern District of New York, and is modelled after Wyatt v. Stickney, the Alabama right to treatment case. The companion case, Patricia Paresi, et al. v. Rockefeller was filed on behalf of the parents of ten other children at Willowbrook by the New York Legal Aid Society and its Staten Island branch. Named as defendants in the two actions are Governor Rockefeller, the State Commissioner of Mental Hygiene, six officials in the Department of Mental Hygiene, and four officials at Willowbrook.

The complaints sought to have conditions at Willowbrook declared in violation of the 5,200 residents' constitutional rights, and specifically alleged violations of the 1st, 8th, and 14th Amendments.

In addition to a declaration of their constitutional rights, plaintiffs sought the following relief: (1) that the Court set minimum standards for adequate treatment and require defendants to implement these standards; (2) that the Court order "compensatory treatment" for regression and deterioration already suffered by plaintiffs; (3) that the Court enjoin the appropriation of more money for Willowbrook until community facilities have been developed; (4) that the Court enjoin the admission of any more residents to Willowbrook until this institution meets Court constitutional standards; and (5) that the Court appoint a receiver or master with the necessary authority to oversee and implement other orders of the Court.

Oral argument was heard in early August concerning plaintiffs' request for preliminary relief. A full hearing was not possible because of the Court's over-crowded schedule. Following oral argument, the Court ruled on July 28, 1972, that the two Willowbrook suits were to be consolidated and that they would be given class action status. The Court gave no specific relief at that time except to require that by September 18 defendants file a report with the Court stating the extent to which they had voluntarily complied with eight primary items of relief selected by plaintiffs from among the various forms of preliminary relief which they requested in their complaint. On June 30th a motion for preliminary relief was filed, supported by a 102 page brief, 500 pages of pre-trial deposition testimony from defendants, massive affidavits from plaintiffs' expert witnesses, and numerous exhibits obtained through pre-trial discovery. (The motion was argued during four days of extensive testimony in December. The hearings were adjourned until January 9, at which time the State concluded its case).

Seventeen witnesses testified orally on behalf of plaintiffs and five on behalf of defendants. The Court also considered over eighty exhibits and a multitude of affidavits, since the time available for hearings on a preliminary injunction did not permit hearing all the witnesses that either party wished to present. After the completion of the hearings and before the final submission of briefs by the parties, the Court spent a day on a visit to Willowbrook.

In hearing the motion for preliminary injunction the Court took a very pragmatic approach. The testimony of experts for both sides indicated that there were a number of conditions which would have to be remedied for the plaintiffs to be assured of safekeeping and custody, let alone adequate habilitation. According to the Court, the extent to which such conditions would be remedied, if the defendants were left to follow their own plans presented the basic issue in the case. The main problems of Willowbrook noted were: overcrowding, with its consequence of dehumanization; understaffing; organizational problems; that the institution is out of scale for the Staten Island Community --a situation that cannot be cured, but that is being litigated by closing admissions and reducing the population; low staff morale-- with the related problems of the high turnover of staff (as much as 41% for ward attendants and 18% per year for the rest) and salary levels which do not give any premium for the disadvantages under which Willowbrook employees operate; and lack of cooperation by the division of the budget.

Along with the above conditions needing remedy, the Court noted that a number of significant steps had already been taken in 1972 for the improvement of Willowbrook including the closing of admissions to Willowbrook and a program of transfer of residents from Willowbrook to other institutions; the abolition of seclusion (although the

abolition was not fully effective); the appointment of a new director, a deputy director for institutional administration (a newly created post), and a new director of education and training; a new organizational plan of "unitization"; the acceleration of disciplinary proceedings against staff members accused of such offenses as absenteeism, child abuse, violence, or drinking; establishment of a small behavior modification unit; decrease in the death rate among the residents; the stepping up of recruitment efforts; and additions to staff.

Having set forth the facts, the Court proceeded with an analysis of relevant law: The Court noted that "of the many complex issues of the law presented, the most difficult involves the newly developed right to treatment," its scope, and the extent to which it embodies a federal constitutional right. The Court commented further that "the proposition that the quid pro quo for commitment in lieu of criminal incarceration must be treatment is not really radical. Expanding that proposition, however, to a constitutional right of habilitation owed by the State of New York to mentally retarded children resident at Willowbrook is more than the next logical step in an inexorable sequence." The Court held that there is no constitutional provision which imposes the duty on a State to provide services to its citizens. It may be argued that the State has reneged on a statutory promise of treatment both under the old and new New York Mental Hygiene Law, and this right would be enforced within the State courts. But in a Federal court, the holding should be that failure to accomplish the original purpose of commitment gives only a right to release or to what anyone is entitled to receive when confined in a State institution. The Court held that "Since Willowbrook residents are for the most part confined behind locked gates, and are held without the possibility of a meaningful waiver of their right to freedom, they must be entitled to at least the same living conditions as prisoners. The rights of Willowbrook residents may rest on the Eighth Amendment, the Due Process Clause of the Fourteenth Amendment, or the Equal Protection Clause of the Fourteenth Amendment (based on a rational discrimination between prisoners and innocent mentally retarded persons). It is not necessary now to determine which source of rights is controlling." Rights of persons in confinement outlined by the Willowbrook court are the right to protection from assaults by fellow inmates or staff; the right to conditions consistent with "basic standards of human decency"; the right to medical care; right to exercise and have outdoor recreation; and the right to adequate heat during cold weather; and to the necessary elements of basic hygiene. These rights do not necessarily exhaust the rights to which the Federal Constitution entitles residents of a place like Willowbrook, but the Court did not find it necessary at the present time to set forth a full catalogue of such rights.

Following its discussion of the law, the Court held that appropriate relief was not barred by the Eleventh Amendment or by any duty of abstention, and that the Court should give specific directions to prevent seclusion and to effect, among other things, a prompt increase in the number of ward attendants, doctors, nurses, physical therapists, and recreation therapists, with salary limits fixed by the Court if those offered by the defendants are inadequate to attract the necessary staff. The Court also ordered consummation within a reasonable time of a contract with an accredited hospital for the care of acutely ill Willowbrook residents and the filing of periodic reports concerning the progress of the defendants in meeting the other articulated requirements. The Court declined to include medical screening in the order since this relates to the right to treatment rather than the right to protection from harm. Provision of the additional staff mentioned above and a contract with an accredited hospital were deemed by the Court to meet the requirements of protection from harm.

The Court's memorandum invites the parties to apply to the Court for the correction of any statements or for modification or clarification of any provisions of the order, and as we go to press both parties are evaluating the Court's decision and considering the advisability of motions for rehearing and/or appeals from the Court's order.

## III. RIGHT TO JUST COMPENSATION FOR LABOR

FLORIDA: Roebuck, et al. v. Florida Department of Health and Rehabilitative Services, et al., Civil Action No. TCA 1041 (N.D. Fla., Tallahassee Division)

This is a class action suit brought by and on behalf of named plaintiffs and all other persons who have been wrongfully classified as "handicapped trainees" and have been receiving or are now receiving subminimum wages as a result of this classification. Defendants are Sunland Hospital of Tallahassee; W. T. Cash Hall Inc.; Miracle Hill Nursing and Convalescent Home Inc.; and other employers unknown to plaintiffs, who are subject to the provisions of the Fair Labor Standards Act.

The complaint alleges that the Department of Health and Rehabilitative Services and the Division of Vocational Rehabilitation have classified plaintiffs as "handicapped trainees" on the basis of discriminatory tests and despite the fact that they are not actually handicapped in terms of their productive capacity. This classification is then certified by the Department of Labor solely on the recommendation of the defendants. Upon making the determination that plaintiffs are handicapped, the defendants have placed the plaintiffs in positions as "trainees" for which they are paid eighty cents per hour, an amount which

represents 50% of the minimum wage established by the Fair Labor Standards Act of 1938 (29 U.S.C. Sec. 201 et seq; hereafter "FLSA").

The complaint further alleges that defendants:

- Have classified the plaintiffs as "handicapped" when the classification is not related to the job task to be performed;

- Have placed the plaintiffs in menial unskilled or low-skilled jobs instead of bona fide training opportunities;

- Have paid wages to the plaintiffs that are not commensurate with those paid to non-handicapped workers in industry in the vicinity for essentially the same type, quality, and quantity of work; and

- Have paid the plaintiffs 50% of the minimum wage when the FLSA states that a rate may not be less than 75% of the minimum.

Plaintiffs claim that this alleged practice of classifying the plaintiffs as "handicapped," and assigning them to jobs of sub-minimum wages violates their rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

The plaintiffs seek the following relief:

- The defendants Department of Health and Division of Vocational Rehabilitation be enjoined from seeking handicapped trainee certificates in violation of the United States Constitution and the FLSA;

- The defendants Sunland Hospital, W. T. Cash Hall and Miracle Hill be required to pay back wages owed to plaintiffs and the members of the class they represent and damages in an amount equal to back pay;

- The Court award costs and attorneys' fees to the plaintiffs.

Defendants in this case moved for dismissal. The court requested more briefs and held two oral arguments, then reserved judgment on defendants' motion. Interrogatories have been served by plaintiffs but not all of their questions were answered.

Plaintiffs subsequently filed a second round of interrogatories, which defendants resisted. Last month, the court ruled that defendants must answer these interrogatories.

MISSOURI: 'Employees of the Department of Public Health and Welfare, State of Missouri v. Department of Public Health and Welfare of the State of Missouri, No. 71-1021 (cert. granted by the United States Supreme Court on March 27, 1972; decided April 18, 1973).

This recently decided United States Supreme Court case, although it was brought on behalf of regular employees of the State of Missouri's state hospitals and training schools, has profound implications for the Townsend and Roebuck court cases, which were brought on behalf of allegedly mentally handicapped workers for wages and overtime payments under the Fair Labor Standards Act.

Petitioners are employees of five mental hospitals, a cancer hospital, and the state training school for girls, all operated by the State of Missouri. Respondents are the Department of Public Health and Welfare and various officials having supervision over the state hospitals and training schools, who are sued in their official capacities and as individuals.

Petitioners brought this class action suit in the U. S. District Court for the Western District of Missouri on August 4, 1969 to recover unpaid overtime compensation allegedly due them under Section 16(b) of the Fair Labor Standards Act, as amended (29 U.S.C. Section 216(b)). The district court sustained respondents' motion to dismiss the complaint upon the ground that this is a suit by citizens of the State against the State and as such is barred by the 11th Amendment. After a reversal by a three-judge panel of the court of appeals and a reinstatement by a five-to-four decision of the 8th Circuit Court of Appeals en banc, the trial court's dismissal of the complaint by the State employees against the State of Missouri agencies was appealed to the U. S. Supreme Court.

On April 18, 1973, the United States Supreme Court, by a vote of 8 to 1, affirmed the ruling by the District Court and Federal Court of Appeals en banc. The majority opinion, written by Justice Douglas and joined in by five others held that the history and tradition of the Eleventh Amendment indicate that a federal court is not competent to render judgment against a non-consenting State. The majority noted that the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce. According to the majority's reasoning, Congress could by means of the commerce power give force to the supremacy clause by lifting the sovereignty of the State and putting the States on the same footing as other employers. But the majority noted that it could not find a word in the history of the 1966 Amendments to indicate a purpose

of Congress to make it possible for a citizen of that State or another State to sue the State in the federal courts. The majority stated that its jurisdictional ruling would not make Congress' extension of coverage to state employees meaningless since Sect. 16(c) of the FLSA still gives the Secretary of Labor power to bring suit for unpaid minimum wages or unpaid overtime compensation, and Sect. 17 gives the Secretary power to enjoin violations of the Act and to obtain restitution in behalf of employees. The Secretary of Labor may still, of course, act on behalf of a State employee because suits by the United States against a State are not barred by the Constitution. The majority noted the number of employees and employers covered under the FLSA and noted objections that if a direct federal court remedy in the form of private damage actions was denied, the court would in effect be recognizing that the FLSA provides a right without any remedy. But according to the majority "Sect. 16(b), however, authorizes employee suits in 'any court of competent jurisdiction.' Arguably that permits suit in the Missouri courts but that is a question we need not reach."

TENNESSEE: Townsend v. Treadway, Commissioner, Tennessee Department of Mental Health, Civil Action No. 6500.

This is a class action brought on February 16, 1972 on behalf of four named resident workers at Clover Bottom Hospital and School and on behalf of all other similarly situated residents. It was filed in the Federal District Court for the Middle District of Tennessee.

The defendants in this suit are the Commissioner of the Department of Mental Health for the State of Tennessee, the Assistant Commissioner, the Superintendent of Clover Bottom Hospital and School, and the members of the Board of Trustees for the Department of Mental Health.

The plaintiffs allege that each and every member of the class was required to labor and perform services by and for the defendants during the entire term of plaintiffs' residency at Clover Bottom Hospital and School, and that such servitude was involuntary. Plaintiffs submit that such compulsory and involuntary servitude has been the policy and practice at Clover Bottom at least since 1923 and that it continues at the present time. Plaintiffs argue that such servitude constitutes peonage in violation of U. S. Statutory Law and the 13th Amendment's prohibition against slavery. This involuntary servitude is also alleged to have been subject, since 1966, to the coverage of the Fair Labor Standards Act, 29 U.S.C. Sec. 201 et seq. The wage rate paid the plaintiffs, 6½

cents per hour, is alleged to be far below the federally required minimum wage, in violation of 29 U.S.C. Sec. 206 and 215. Plaintiffs further allege that defendants failed and continue to fail to withhold retirement and federal insurance contribution taxes on the wages that have been paid and are paid to the plaintiffs. Such failure is in violation of U. S. and Tennessee law.

The relief requested by plaintiffs is that the court issue preliminary and permanent injunctions restraining defendants from imposing peonage and involuntary servitude on the plaintiffs, from paying less than a minimum wage under the Fair Labor Standards Act, and from continuing to fail to withhold retirement and F.I.C.A. taxes for past and present employment.

Plaintiffs also seek money damages for the violation of their statutory ($5,047,776 plus interest) and constitutional rights, back wages under the F.L.S.A. ($3,946,176 plus interest), and the award of reasonable attorneys' fees and costs.

Defendants filed seven separate motions for summary judgment on March 8, which were denied on July 24, 1972. Negotiations on a proposed settlement have proved unsuccessful. In early March 1973, the court certified this case as a class action. At the same time the court denied defendants' motion for summary judgment, but ruled that plaintiffs (none of whom are presently committed to Clover Bottom) did not have standing to seek injunctive relief. Pre-trial briefs have been filed, and a hearing has been scheduled for May 15, 1973. But please note the recent decision of the United States Supreme Court in Employees of the Department of Public Health and Welfare of Missouri.

WASHINGTON, D.C.: Souder, et al., v. Brennan, et al., Civil Action No. 482-73.

This class action, arising under the Fair Labor Standards Act of 1938, as amended in 1966, was filed on March 13, 1973 by three named mentally ill and mentally retarded residents in state institutions and by the American Association on Mental Deficiency and the National Association for Mental Health. Plaintiffs seek to compel the Defendant Secretary of Labor and his subordinates to perform their alleged statutory duty of enforcing the minimum wage and overtime compensation provisions of the FLSA against non-federal institutions for the mentally handicapped so as to ensure that the thousands of institutional residents who perform labor for such institutions without pay or for merely token wages shall be justly compensated.

The defendants in this suit are the Secretary of Labor, Peter J. Brennan, and four of his subordinate administrators. The purpose of this suit is to compel the Department of Labor to begin enforcement of the Fair Labor Standards Act as it applies to working patients and residents in the institutions. No State agencies or individual institutions are defendants in this action. This is not an action to obtain back wages or money damages of any kind, but rather to require prospective enforcement of plaintiffs' alleged statutory rights.

In 1966, the Fair Labor Standards Act was amended to extend minimum wage and overtime provisions to all nonprofessional and nonsupervisory employees of institutions, hospitals, and schools for the mentally handicapped. Patients and resident workers were not explicitly exempted, but the Department of Labor, responsible for the overall administration and enforcement of the FLSA has never enforced the minimum wage and overtime provisions for patient and resident workers.

The complaint was filed on March 13, 1973, and plaintiffs filed interrogatories on April 20, 1973. Defendants have yet to answer the complaint or to move for dismissal. Because this suit is directed toward federal Department of Labor officials, it circumvents the sovereign immunity and Eleventh Amendment obstacles raised in the suits for private damages and crystallized in the recent Supreme Court decision on Employees of the Department of Public Health and Welfare of Missouri.

## IV. RIGHT TO EDUCATION

PENNSYLVANIA: Pennsylvania Association for Retarded Children, Nancy Beth Bowman, et al. v. Commonwealth of Pennsylvania, David H. Kurtzman, et al., 334 F. Supp. 1257 (3-Judge Court, E.D. Pennsylvania, 1971).

The opinion and order in the case, which came down on October 7, 1971, was the first important legal breakthrough in the vindication of the rights of the mentally retarded.

The plaintiffs in this class action were the Pennsylvania Association for Retarded Children, 14 named retarded children who were denied an appropriate education at public expense in Pennsylvania, and all other children similarly situated. The defendants were the Commonwealth of Pennsylvania, the Secretary of the Department of Education, the State Board of Education, the Secretary of the Department of Public Welfare, certain school districts and intermediate units in the Commonwealth of Pennsylvania, their officers, employees, agents and successors.

After an initial complaint was filed on January 7, 1971, the parties came together and agreed to certain findings and conclusions and to relief to be provided to the named plaintiffs and to the members of their class.

A stipulation by the parties, approved and ordered into effect by the Court on June 18, 1971, focused on the provision of due process rights to children alleged to be mentally retarded. The Court's order specifically states that no such child may be denied admission to a public school program or have his educational status changed without first being accorded notice and the opportunity for a due process hearing. This June 18 order outlines due process requirements in detail, beginning with provisions to ensure notification of parents that their child is being considered for a change in educational status and ending with detailed provisions for a formal due process hearing, including representation by legal counsel, the right to examine the child's record before the hearing, the right to present evidence of one's own, to cross examine other witnesses, the right to independent medical, psychological and educational evaluation, the right to a transcribed record of the hearing, and the right to a decision on the record. All of these due process procedures went into effect on June 18, 1971, and, as of today, hearings in compliance with these procedures have already been held.

Further stipulations by the parties, going beyond the provision of due process at placement hearings, were formally ordered into effect by the Court's October 7, 1971, interim order, injunction, and consent agreement. Under this order, defendants are bound to refrain from applying various sections of the School Code of 1949 in such a way as to deny any mentally retarded child access to a free public program of education and training in violation of the equal protection clause of the 14th Amendment.

The parties' consent agreement states that:

> "expert testimony in this action indicates that all mentally retarded persons are capable of benefiting from the program of education and training; the greatest number of retarded persons, given such education and training, are capable of achieving self-sufficiency, and the remaining few, with such education and training, are capable of achieving some degree of self-care; that the earlier such education and training begins, the more thoroughly and the more efficiently the mentally retarded person will benefit from it; and, whether begun early or not, that a mentally retarded person can benefit at any point in his life and development from the program of education and training. ...It is the Commonwealth's obligation to place each mentally retarded child in a free, public program of education and training appropriate to the child's

capacity within the context of a presumption that, among the alternative programs of education and training required by statute to be available, placement in a regular public school class is preferable to placement in a special public school class, and placement in a special public school class is preferable to placement in any other type of program of education and training."

The consent agreement and order provided that each of the named plaintiffs should be immediately re-evaluated by defendants and, as soon as possible, but in no event later than October 13, 1971, should be accorded access to a free public program of education and training appropriate to his learning capacities.

It was further ordered that every retarded person between the ages of 6 and 21 years of age as of the date of the order and thereafter, should be provided access to a free public program of education and training appropriate to his capacities as soon as possible, but in no event later than September 1, 1972.

The Court's order further requires that the State Department of Education shall supervise educational programs within State institutions for the retarded, and that there will be automatic re-evaluation of all children placed on homebound instruction every three months.

To implement the aforementioned relief and to assure its extension to all members of the plaintiff class, the court appointed two masters for the purpose of overseeing a process of identification, evaluation, notification, and compliance. Defendants were given a time schedule within which to formulate and submit to the masters for approval a plan for the implementation of the consent agreement which would result in the placement of all retarded children in programs by September 1, 1972.

On May 5, 1972, the court entered a final opinion, order and decree in this case, rejecting arguments by members of the defendant class who were not parties to the earlier stipulations that the court lacked jurisdiction to decide this case and/or should abstain from deciding the case until a State court had first had opportunity to hear and decide plaintiffs' claims.

WASHINGTON, D.C.: Mills v. Board of Education of the District of Columbia, Civil Action No. 1969071 (Decided by U.S. District Court Judge Joseph C. Waddy, August 1, 1972).

This case was brought as a class action before the Federal District Court in the District of Columbia. The complaint was filed on September 21, 1971.

Plaintiffs were school-age children, residents of the District of Columbia, who had been denied placement in a publicly-supported educational program for substantial periods of time. Defendants were the Board of Education and its members, Mayor Washington, the Director of the Social Security Administration, and various administrators of the D.C. School System.

The named plaintiffs had been denied schooling because of alleged mental, behavioral, physical, or emotional handicaps or deficiencies. The named plaintiffs sued on behalf of a class of children who were or would be residents of the District of Columbia, were of an age so as to be eligible for publicly-supported education, and were then, were during the 1970-1971 school year, or would be excluded, suspended, expelled or otherwise denied a full and suitable publicly-supported education. Plaintiffs asked the Court to declare their rights and to enjoin defendants from excluding them from the District of Columbia Public Schools and/or from denying them publicly-supported education and to compel the defendants to provide them with immedate and adequate education and educational facilities in the public schools or alternative placement at public expense, and also to give them additional relief to help effectuate the primary relief. The defendants in their answer to the complaint conceded that they had the legal "duty to provide a publicly-supported education to each resident of the District of Columbia who is capable of benefiting from such instruction." Defendants' excuse for failing to provide such an education was the lack of necessary fiscal resources.

Judge Joseph C. Waddy entered an interim order in this case in December, 1971, requiring that the named plaintiffs be put into school. This interim order required defendants to make outreach efforts to identify other members of the plaintiff class and directed the parties to consider the appointment of a master. As defendants failed to comply with the order, plaintiffs filed for summary judgment in January 1972. At an open hearing on March 24, 1972, Judge Waddy orally granted summary judgment for the plaintiffs but delayed issuance of a detailed decree. On April 7, 1972, the Board of Education and its employees (alone among the defendants) submitted a proposed form of order and other materials.

On August 1, 1972, Judge Waddy's memorandum opinion, judgment, and decree were handed down. The court stated that there was no genuine issue of material fact as to the District's responsibilities because Congress had decreed a system of publicly-supported education for the children of the District, and the Board of Education had been given the responsibility for administering this system according to law, including the responsibility for providing education to all "exceptional" children. Although defendants admitted their affirmative duty, the court noted that

"throughout the proceedings it has been obvious to the court that the defendants have no common program or plan for the alleviation of the problems posed by this litigation and that this lack of communication, cooperation and plan is typical and contributes to the problem." The court based plaintiffs' entitlement to relief on applicable statutes and regulations of the District's Code and the United States Constitution. The D.C. Code requires that parents or guardians enroll children between seven and sixteen years of age in school and sets criminal penalties for parents' failure to comply. "The court need not belabor the fact that requiring parents to see that their children attend school under pain of criminal penalties presupposes that an educational opportunity will be made available to the children. The Board of Education is required to make such opportunity available."

As to the Constitutional basis for the holding, Judge Waddy found plaintiffs' right to education within the due process clause of the Fifth Amendment, and cited precedents such as Brown v. Board of Education (1954) outlawing school segregation, and Hobson v. Hansen (1967) abolishing the so-called track system in the District. The court held that "(t)he defendants' conduct here, denying plaintiffs and their class not just an equal publicly-supported education while providing such education to other children, is violative of the Due Process Clause. Not only are plaintiffs and their class denied the publicly supported education to which they are entitled, but many are suspended or expelled from regular schooling or specialized instruction or reassigned without any prior hearing and are given no periodic review thereafter. Due process of law requires a hearing prior to exclusion, termination or classification into a special program."

Judge Waddy held further that defendants' failure to fulfill their clear duty could not be excused by the claim of insufficient funds. "If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system, then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly-supported education consistent with his needs and ability to benefit therefrom. The inadequacies of the District of Columbia Public School System, whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the 'exceptional' or handicapped child than on the normal child."

To implement the decision, the Court placed responsibility with the Board of Education, and warned that a special master with educational expertise would be appointed if a dispute arose between the Board and the District Government, or if there were inaction, delay, or failure by the defendants to implement the judgment and decree within

the time specified. The Court retained jurisdiction of the case to assure prompt implementation.

The judgment provides:

- That no child eligible for a publicly-supported education in the District of Columbia public schools shall be excluded from a regular public school assignment by rule, policy, or practice of the Board or its agents unless such child is provided: (a) adequate alternative educational services suited to the child's needs, which may include special education or tuition grants; and (b) a constitutionally adequate prior hearing and periodic review of his status, progress, and the adequacy of any educational alternative.

- That defendants and those working with them be enjoined from taking any actions which would exclude plaintiffs and members of their class from a regular public school assignment without providing them with alternatives at public expense and a constitutionally adequate hearing.

- That the District of Columbia shall provide to each child of school age a free and suitable publicly-supported education regardless of the degree of the child's mental, physical or emotional disability or impairment. Insufficient resources may not be a basis for exclusion.

- That defendants may not suspend a child from public schools for disciplinary reasons for more than two days without a hearing and without providing for his education during the period of suspension.

- That defendants must provide each identified member of the class with an education suited to his needs within 30 days; and must provide likewise for others similarly situated within 20 days after such persons become known to them.

- That defendants place announcements and notices in specified media, and meet specific notice requirements to parents.

- That defendants file within 45 days, a comprehensive plan which provides for identification, notification, assessment and placement of class members; also, that defendants file within 45 days a report showing expunction from or correction of all official records of any plaintiff with regard to past expulsions, suspensions, or exclusions effected in violation of the procedural rights set forth in the order.

Judge Waddy further set out elaborate notice and hearing procedures relating to placement, disciplinary actions, and transfers. The presumption underlying placement would be that among the alternative programs of education, placement in a regular public school class with appropriate ancillary services is preferable to placement in a special school class.

Procedures to be followed include:

- Written notice by registered mail to the parent or guardian of the child.

- Notice that describes the proposed action in detail, clearly stating reasons; describing alternative educational opportunities; informing the parents or guardians of their right to object to the proposed action; informing them the child is eligible to receive for free the services of a diagnostic center for an independent medical, psychological, and educational evaluation; informing them of the right to representation at the hearing by legal counsel, and of the right to examine the child's school records. The hearing itself must be scheduled so as to be reasonably convenient for the parents or guardian.

- Some additional procedural safeguards are also written into the order.

Mills v. Board of Education expands the principle of the landmark Pennsylvania right to education case (see earlier summary) so as to give the right to an individually appropriate public education not only to the mentally retarded but also to all other children suffering or alleged to be suffering from mental, behavioral, emotional, or physical handicaps or deficiencies. While the Pennsylvania decision rested upon a consent agreement between the parties, the Mills case is a pure constitutional holding, and thus has even stronger precedential value.

Because the time for filing an appeal expired without any notice of appeal having been filed by defendants, this decision is now a final and irrevocable determination of plaintiffs' constitutional rights. Implementation of the Court's Order is proceeding slowly and with many difficulties. It is still too early to say what the final practical impact of this opinion will be.

CALIFORNIA: Lori Case, et al. v. State of California, Department of Education, et al., Civil Action No. 101679 (Cal. Superior Court, Riverside County).

Lori Case is a school-age child who has been definitively diagnosed

as autistic and deaf, and who may also be mentally retarded. After unsuccessfully attending a number of schools, both public and private for children with a variety of handicaps, Lori was enrolled in the multi-handicapped unit at the California School for the Deaf at Riverside, California. As a result of a case conference called to discuss Lori's status and progress in school, it was decided to terminate her placement on the grounds that she was severely mentally retarded, incapable of making educational progress, and required custodial and medical treatment and intensive instruction that could not be provided by the school because of staffing and program limitations.

Plaintiffs argue that the consequences of the denial of education to Lori Case are so catastrophic that, absent a compelling justification, equal protection has been violated. Plaintiffs argue further that because there is no basis for believing that the State legislature intended to give the Board of School Administrators the right to terminate a student's education under these circumstances, there has been an inappropriate delegation of authority. Plaintiffs assert that the record shows that Lori Case is educable, and that under the circumstances of this case, there was a denial of procedural due process to have terminated Lori Case's education without a full due process hearing.

The plaintiffs sought an immediate temporary restraining order and a preliminary and permanent injunction restraining defendants from preventing, prohibiting or in any manner interfering with Lori's education at the California School for the Deaf at Riverside, California.

The case was filed on January 7, 1972, and a temporary restraining order was granted the same day. A preliminary injunction was granted on January 28, 1972. Plaintiffs' first set of interrogatories was filed on March 10, 1972.

A factual hearing was held on September 5, 1972. On December 11, 1972, Judge E. Scott Dales issued a Notice of Intended Decision denying plaintiffs' relief. The court said that plaintiffs' case was without merit and that a preponderance of the evidence supported a finding for the defendants.

Plaintiffs have requested the court to issue its Findings of Fact and Conclusions of Law and have moved for a new trial. The motion has been denied. Plaintiffs will request the California Supreme Court to take jurisdiction of the case.

COLORADO: Colorado Association for Retarded Children v. The State of Colorado (United States District Court, Colorado).

Plaintiffs in this class action, filed in late December 1972, are the Colorado Association for Retarded Children and 19 named physically and mentally handicapped children, some of whom are retarded. The defendants are the State of Colorado, the Governor, the State Department of Education and Institutions, the State Board of Education and Colorado school districts.

This case is modeled after the PARC case. Defendants have filed a motion to dismiss and both sides briefed this motion. No decision has yet been handed down.

CONNECTICUT: Seth Kivell, P.P.A. v. Dr. Bernard Nemoitan, et al., No. 143913, (Superior Court, Fairfield County, Connecticut, July 18, 1972).

This "right to education" suit was brought by the mother of a 12 year old child who has been a "perceptually handicapped child with learning disabilities" since before February 1970. The suit sought both a mandamus directing the defendants--members of the Stamford, Connecticut Board of Education--to perform their duties towards the minor in accordance with State statutes mandating special education for an exceptional child and money damages against the defendants for reimbursement of tuition expended by the mother for an out-of-State educational facility. In a decision issued July 18, 1972, Judge Robert Testo found for the plaintiffs on both counts noting defendants own admissions that the program offered to the plaintiffs for the school year 1970-71 by the defendants would not have met the plaintiff's special educational needs.

However, the court was careful to limit the scope of its holding. Judge Testo wrote:

> "This Court will frown upon any unilateral actions by parents in sending their children to other facilities. If a program is timely filed by a local board of education and is accepted and approved by the state board of education, then it is the duty of the parents to accept said program. A refusal by the parents in such a situation will not entitle said child to any benefits from this Court."

FLORIDA: Florida Association for Retarded Children, et al., v. State Board of Education, Civil Action No. 730250-CIV-NCR (United States District Court, Southern District of Florida).

Plaintiffs in this class action suit are a number of mentally retarded children (the oldest is 20 years and the youngest is 6), the Florida Association for Retarded Children and the Dade County Association for Retarded Children. Defendants are the State Board of Education, the Governor of Florida, and a number of other officials concerned directly or indirectly with education in the State of Florida.

Plaintiffs share membership in one class: those who are totally excluded from a public education in Florida. The plaintiffs also represent three separate and distinct sub-classes: those who have been or will be excluded before the age of seven years; those who have been and will be excluded upon reaching the age of 16 years; and those under the care of the Department of Health and Rehabilitative Services, primarily in State schools for the retarded. This suit is modelled along the Pennsylvania and Mills lines, and raises similar legal issues and requests relief similar to those cases. One unique feature of this case relates to Florida Statute 236.04(4)(a) which is a statutory exclusion of children who are not "educable or trainable." Plaintiffs ask that the District Court assume jurisdiction and convoke a three-judge court to hear the count of the complaint which seeks to declare this statutory provision unconstitutional as creating two classes of mentally retarded children: those who are "educable and trainable" and those who are not. Plaintiffs allege that the statute and the criteria promulgated thereunder constitute both an arbitrary and irrational classification, and a classification devoid of any compelling state interest.

The original complaint in this case was filed in February, and an amended complaint was filed on April 4, 1973. As yet the State defendants have filed no responsive pleadings.

MARYLAND: Maryland Association for Retarded Children, Leonard Bramble, et al., v. State of Maryland, et al., Civil Action No. 720733-K (U.S. District Court, Maryland).

A class action suit has been brought by the Maryland Association for Retarded Children and 14 mentally retarded children against the State of Maryland and its state board of education, for their failure to provide retarded or otherwise handicapped children with an equal and free public education.

As in other right to education cases, the complaint emphasizes the importance of providing all persons with an education that will enable

them to become good citizens, achieve to the full extent of their abilities, prepare for later training, and adjust normally to their environment. It is further argued that "the opportunity of an education, where the State has undertaken to provide it, is a right that must be made available to all on equal terms."

The plaintiffs allege that the State's tuition assistance program provides insufficient funds to educate these children, and thus parents are forced to use their own resources. Another allegation is that the State, when making placement decisions, does not provide for notice and procedural due process.

The plaintiffs are seeking declaratory and injunctive relief, including a 60-day order for free, publicly-supported education with appropriate structure and guidelines to guarantee that the individual child's needs are met. They further seek compensatory education for those children formerly excluded from school, and appointment of a master.

An amended complaint was filed May 26th.

MICHIGAN: Harrison, et al. v. State of Michigan, et al., Civil Action No. 38557 (E.D., Michigan).

This is a class action for declaratory and injunctive relief brought on May 25, 1972. The named plaintiffs are separated into three distinct groups. Group one consists of persons who are being denied a publicly-supported education and have been labeled by the defendants as "mentally retarded," "emotionally disturbed," "behavioral problem or otherwise handicapped"; group two consists of dependent wards of the State of Michigan, who are being given only bare custodial care and are being denied a publicly supported education; and group three consists of persons who are enrolled in publicly-supported special education programs which are inadequate to educate them at a level consistent with their demonstrated capacity.

The complaint alleged that neither the Michigan statutory scheme nor the changes made by the recent mandatory Special Education Act accord the plaintiffs the rights they seek to enforce in this proceeding. Although the Special Education Act does require the development of special education classes, the relevant sections will not be implemented until the 1973-1974 school year. Furthermore, the act does not provide for compensatory education or a hearing prior to a change of status or classification. The complaint charged that the denial of publicly-supported education to the plaintiffs deprives the plaintiffs of any and all educational opportunity; that the denial of education violates the plaintiffs' rights of equal protection of the law and due process under the Fourteenth Amendment; that plaintiffs

who are of poor families are particularly denied equal protection in that defendants' acts and practices have the effect of conditioning their right to any education upon the impermissible criteria of wealth; and that the defendants' acts and practices are violative of the equal protection clause in that although plaintiffs' families are all taxed for the support of a system of public education, their children are denied the benefits thereof, and are refused admittance to a regular public school or reassigned or transferred from a regular public school without a due process hearing.

Plaintiffs asked the Court inter alia:

1. To declare that defendants' acts and practices deny plaintiffs Due Process of Law and Equal Protection under the Fourteenth Amendment to the U. S. Constitution.

2. To enjoin defendants from excluding the plaintiffs and the class they represent from a regular public school placement without providing (a) adequate and immediate alternatives, including but not limited to, special education, and (b) a constitutionally adequate prior hearing and periodic review of their status, progress and the adequacy of any educational alternative.

3. To require defendants to:

   a. Provide plaintiffs, and all members of the class they represent, with a publicly-supported education within thirty days of the entry of its Order;

   b. Within fourteen days of the entry of its Order, submit a report to the Court listing each person presently suspended, expelled, excluded from, or not receiving a publicly-supported education, the reason for, and the date and length of, each such suspension, expulsion, exclusion, or other denial, and the proposed time and type of educational placement of each such child;

   c. Notify, within forty-eight hours of the submission of said report, the parents or guardian of each such person and inform each as to the child's right to a publicly-supported education and as to that child's proposed educational placement;

   d. Cause to be publicly announced, within twenty days of the entry of its Order, to all parents in the State of Michigan that all children, regardless of handicap or

other alleged disability, have a right to an education; and to inform such parents of the procedures required to enroll their children in an appropriate program; and to submit a plan to the Court and counsel for plaintiffs for future periodic announcements; and

e. Hold constitutionally adequate hearings before a master or other appropriate person, to be appointed by the Court, for any member of plaintiff's class who feels aggrieved by his subsequent education placement.

The request for relief further detailed the due process procedures by which the hearings are to be held, by which the review of the proceeding and the records are to be kept, and requests submission within thirty days of the Court's order of a plan for these due process measures.

This case was dismissed on motion due to mootness. Since there exists in Michigan a statute requiring mandatory education for all handicapped children, which will become effective in September 1973, the court ruled that it could not devise a plan or implement a plan sooner than that date. In dismissing the complaint, the court held for the first time in Michigan that the handicapped have an equal protection right to education. The attorneys feel that this order will shape the controversy for the fall if the statute is not implemented.

NEW YORK: Reid v. Board of Education of City of New York, Civil Action No. 71-1380, U.S. District Court, (S.D., New York).

This is a class action brought on behalf of parents whose educable, brain-damaged children either have been determined eligible for special public school classes, but have not yet been placed in such classes, or have been referred to these classes after preliminary screening and are awaiting a final screening. Plaintiffs seek a declaratory judgment and preliminary and permanent injunctions to prevent a deprivation under color of State law of rights protected by the Fourteenth Amendment. The defendants are the Board of Education of the City of New York and its Chancellor.

The complaint in this case alleges that over 400 children in New York City have been preliminarily diagnosed as brain-damaged, but are awaiting screening, and that, at the current rate, it would take two years until all had their eligibility determined. Over 200 other children have been found eligible, and are awaiting placement in special classes. Plaintiffs further allege that:

1. The failure of defendants to screen all applicants for the public school classes within a reasonable time and to provide special public school classes for all eligible

children denies plaintiffs and members of their class their rights under the equal protection and due process clauses;

2. The failure of defendants to screen all applicants for the special public school classes within a reasonable time and to provide special public school classes for all educable brain-impaired children while they do provide public school classes for all unhandicapped children denies plaintiffs and their class their rights under the equal protection clause;

3. Plaintiffs and other members of their class have been denied their federal constitutional right to a free public education;

4. These unconstitutional actions on the part of defendants are severely injuring plaintiffs and other members of their class by placing them generally in regular classes which constitute no more than custodial care for children in need of special attention and instruction. Alternatively, plaintiffs are given home instruction one or two hours per week, which is equally inadequate. If immediate relief is not forthcoming, all members of the class will be irreparably injured in that every day in a regular school class or at home delays the start of special instruction. All experts in the field acknowledge that special instruction is only effective if commenced immediately after the condition is discovered.

On June 22, 1971, Judge Metzner for the U.S. District Court for the Southern District of New York denied the motion for a preliminary injunction, and granted the defendants motion to dismiss. The Court applied the abstention doctrine, reasoning that since there was no charge of deliberate discrimination, this was a case where the State Court could provide an adequate remedy and where resort to the federal courts was unnecessary.

On appeal, the Second Circuit Court of Appeals, vacated the District Court Order, and remanded the case on a rather technical but still important point. The three-judge panel, in a December 14, 1971 decision, ruled that Federal jurisdiction should have been retained pending a determination--now taking place--of the state claims in New York State Courts.

Pursuant to the Second Circuit Court of Appeals decision on abstention, plaintiffs filed their complaint with the State Commissioner of Education. Plaintiffs' claims are basically the same, with state constitutional claims added.

A hearing was held before the State Commissioner on January 16, 1973. The case was expanded to include all handicapped children. Plaintiffs have submitted a proposed order, defendants have filed comments on this order, and the parties are awaiting a decision.

NEW YORK: Piontkowski v. John Gunning and The Syracuse School District (filed with the Commissioner of Education for the State of New York on August 4, 1972).

This class action, filed with the Commissioner of Education for the State of New York against the Syracuse Board of Education, charged the Board with failure to educate over 40 "trainable mentally retarded" children. Lawyers for plaintiffs had spent six months investigating the city's policy of excluding this group of children and had met with the majority of parents to consider possible legal action.

On August 22, 1972, attorneys for the Syracuse City Board of Education filed a respondent's brief with the Commissioner of Education. The respondants agreed that the children cited as plaintiffs, along with approximately twenty other children (they denied that they were as many as forty), were entitled to public school education. The School Board instructed its staff to immediately open classrooms for this group of 22 children. Plaintiffs' lawyers are currently concerned with implementation of the School Board's instruction and specifically with outreach efforts to identify other mentally retarded children who have been excluded from public education in New York and who are entitled to such education under the School Board's decision.

NEW YORK: In the Matter of Peter Held, Civil Action No. H-2-71, H-10-71, (Family Court of the State of New York, County of Westchester, November 29, 1971).

This "right to education" case was first filed in January 1971 by the mother of an 11 year old handicapped child. On November 29, 1971 the court granted the cost of providing for the special education of the child in accordance with the provisions of Section 4403 of the New York State Education Law. An initial decision in this case in June 1971 ordering the State of New York and the City of Mt. Vernon to pay plaintiff's private school tuition had been vacated in August 1971. A new trial was ordered because the court had lacked jurisdiction over the City of Mt. Vernon, plaintiffs, having failed to make a valid service of process upon the city. In the second trial, the City of Mt. Vernon and its School District were properly named as defendants along with Westchester County.

In his decision, Judge Dachenhausen noted that before the plaintiff began to attend a private special education facility in New York

City, the 11 year old child's reading level was recorded at only 1.5 despite 5 years of public education. In the year since he entered the private school he raised his reading level by about 2 grade levels. Further, the court noted that the Superintendent of the Mt. Vernon Public Schools certified that the special facilities available at the private school were not available in Held's home school district.

NORTH CAROLINA: Crystal Rene Hamilton v. Dr. J. Iverson Riddle, Superintendent of Western Carolina Center, Civil Action No. 72-86 (Charlotte Division, W.D. of North Carolina).

This case was filed on May 5, 1972 in the Charlotte Division of the Western District Court of North Carolina on behalf of Crystal Rene Hamilton--a mentally retarded 8 year old--and all other school age mentally retarded children in North Carolina. Defendants include the Superintendent of the Western Carolina Center, a State institution for the mentally retarded; the Secretary of the North Carolina Department of Human Resources; the State Superintendent of Public Instruction; and the Chairman of the Gaston County Board of Education.

When she was admitted to the Western Carolina Center in November 1971, Crystal had received only nine hours of publicly-supported training. She was admitted to the Center "under the provision that she would be able to remain in said Center for a period of only six months, after which time it would be necessary for her to return to her home and be cared for by her parents." The complaint alleged that the parents were unable to provide "this care and treatment," that the State does not have other facilities to provide the care, and the Center administrator has notified Crystal's parents to take her home.

The legal basis of the complaint in this case is that the State, through its board and agencies, "has failed to provide equal educational facilities for the plaintiff and has denied to her access to education and training . . " The North Carolina statute "guarantees equal free educational opportunities for all children of the State between the ages of six and twenty-one years of age." Also at issue is the classification scheme used by the State which "selects some students as eligible for education and some as not . . " Further, the complaint argues that the State's practice of making financial demands upon the parents of mentally retarded children for the care and treatment of their children is a denial of equal protection to these children.

The defendants in this case were given until December 1, 1972 to provide the judge with information concerning their activities on behalf of the educable retarded. This order was made in conference, orally, and was never dictated. Some of the informa-

tion has been provided, and the rest will be coming in shortly, from the 150 public school units in North Carolina. The judge wants to narrow the factual context of the case for the three-judge panel which has been convened. This case has been consolidated with the case of North Carolina Association for Retarded Children, James Auten Moore v. State of North Carolina (description below).

NORTH CAROLINA: North Carolina Association for Retarded Children, Inc., James Auten Moore, et al., v. The State of North Carolina Board of Public Education (E.D., N.C., Raleigh Division).

This is a class action brought on May 18, 1972 on behalf of all persons who are residents of North Carolina, age 6 and over, who are eligible for free public education, but who have by the defendants (1) been excluded or (2) been excused from attendance at public schools or (3) had their admission postponed or (4) otherwise have been refused free access to public education or training commensurate with their capabilities because they are retarded. The defendants named in the complaint are the State of North Carolina; the State Board of Education; and others. The two school districts named as defendants are typical of all of the State's local city or county education agencies. The Board of County Commissioners is also named as representative of all of the State's county boards that "have the authority and duty to levy taxes for the support of the schools."

The complaint alleges that the defendants have excluded the plaintiffs and the class they represent from a free public school education in violation of the constitution of the State of North Carolina which provides for all students to have free public school education. The complaint further alleges that the school exclusion laws (G.S. §115-165, G.S. §115-296, G.S. §115-200, G.S. §115-300) applied by the defendants are unconstitutional on their face and as applied in that they:

1. Deprive plaintiffs of the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States by arbitrarily and capriciously discriminating against persons severely afflicted by mental, emotional or physical incapabilities. Those children are forbidden from attending public schools of the State upon determination of the child's inability to profit from instruction;

2. Deprive plaintiffs of due process of law in violation of the Fourteenth Amendment in that they arbitrarily deny retarded children of school age the education and the opportunities to become self-sufficient, contributing

members of the State, guaranteed them by the Constitution and the laws of the State of North Carolina;

3. Deprive plaintiffs of equal protection of the law in violation of the Fourteenth Amendment by conditioning their education upon the criteria of wealth. Exclusion of children from public schools necessitates enrollment in private schools if education is to be acquired;

4. Deprive the plaintiffs of equal protection of the law in violation of the Fourteenth Amendment by taxing the plaintiffs' parents for support of public education while denying that education to their children; and

5. Deprive plaintiffs of procedural due process of law in violation of the Fourteenth Amendment in that there is no provision for notice of a hearing or a right to a hearing prior to or after the exclusion of a child from public school.

Other counts included in the complaint are as follows:

1. The North Carolina statute requiring parents to send their children to school contains an exception which relieves parents of children "afflicted by mental, emotional, or physical incapacities so as to make it unlikely that such child could substantially profit by instruction given in the public schools" from that responsibility. The statute was designed to allow flexibility in the decision as to whether to send one's child to public school, but instead has been used as a mandate for non-attendance contrary to the parents' wishes;

2. The defendants have ignored the law that all children are eligible for public school enrollment at age six, and have excluded retarded children until they are older;

3. The defendants have denied the right of the plaintiffs to attend public schools and to an education by excluding and excusing them from school, by postponing their admission to school, by terminating their attendance, and by failing to provide education for children residing at state schools, hospitals, institutions, and other facilities for the retarded.

The complaint seeks the following declaratory and injunctive relief:

1. Declaration that all relevant statutes, policies, procedures, and practices are unconstitutional;

2. Injunction of the defendants from enforcing the relevant statutes, from denying admission to the public schools and an education to any retarded child of school age and otherwise giving differential treatment concerning attendance at school to any retarded child of school age;

3. Granting of a permanent mandatory injunction directing the defendants to provide, maintain, administer, supervise, and operate classes in schools for the education of all retarded children in each school or schools provided by the District, with the costs of such classes to be charged to the State of North Carolina or to the appropriate county or both;

4. Granting of a permanent mandatory injunction directing the defendants to provide compensatory years of education to each retarded person who has been excluded, excused or otherwise denied the right to attend school while of school age;

5. Granting of a permanent mandatory injunction directing the defendants to establish training programs and centers for retarded children, in schools, institutions, or if necessary at home, with all costs being charged to the responsible public agency.

On July 31, 1972, the plaintiffs submitted an amended complaint alleging that they were not receiving adequate habilitation and treatment.

Defendants in this case have moved to dissolve the three-judge panel claiming a lack of federal jurisdiction. The court decided to withhold its ruling on this motion until it heard the merits of the case. Discovery is underway, and a trial date has yet to be set.

NORTH DAKOTA: North Dakota Association for Retarded Children v. Peterson (U.S. District Court, North Dakota, Southwestern Division, filed November 1972).

This class action right to education suit, modelled on PARC and Mills, was filed on behalf of the North Dakota Association for Retarded Children and thirteen named children who represent the class of all other children similarly situated.

The defendants in this suit include the State Superintendent of Public Instruction, the State Board of Education, the State Director of Institutions, the Superintendent of the State School for the Mentally Retarded, and six local school districts which are representative of all such school districts in the State.

The complaint alleges that only about 27% of the 25,000 children in North Dakota who need special education services are enrolled in

such programs. The complaint seeks appropriate public education for children who are presently enrolled in private educational programs usually at extra expense to the child's family because no public school program exists; to those attending public schools but receiving inappropriate education; to those who are at home and receiving no education whatsoever; and to those who are institutionalized at the Grafton State School for the Mentally Retarded, where existing programs are allegedly insufficient to meet educational needs. The relief sought is for defendants to provide, maintain, administer, supervise, and operate classes and schools for the education of the retarded and other handicapped children throughout the State of North Dakota; to provide educational opportunities to children at the Grafton State School, and to require compensatory education to plaintiff children and their class who have incurred disabilities because, while they are of school age, they have not been provided with meaningful education suited to their needs.

An amended complaint has been filed in this case, and the State and the school districts have filed motions to dismiss. At a pretrial conference one of the issues discussed was whether a mandatory special education law passed by the State of Dakota in late March 1973 has mooted the case. Plaintiffs' position is that state statute does not make the lawsuit unnecessary because it does not have to be implemented until 1980, and it includes inadequate due process procedures.

WISCONSIN: Mindy Linda Panitch, et al. v. State of Wisconsin, Civil Action No. 72-L-461 (U. S. District Court, Wisconsin).

This suit is being brought against the State by Mindy Linda Panitch as representative of a class of children "who are multi-handicapped, educable children between the ages of four and twenty years, whom the State of Wisconsin through local school districts and the Department of Public Instruction is presently excluding from and denying to, a program of education and/or training in the public schools or in equivalent educational facilities."

At issue in this action is a Wisconsin statute and policy enabling handicapped children to attend "a special school, class or center" outside the State. When this occurs, and depending upon the population of the child's residence, either the county or school district is required to pay the tuition and transportation. State policy limits the enrollment of children under this act to "public institutions."

The original complaint alleges that the plaintiff and members of the class are denied equal protection of the laws since the "defendant does not, either through local school districts or the Department of Public Instruction, provide any facility within the

State to provide an education and/or training to plaintiff and other members of the class." This violation of the laws, it is alleged, occurs even though special education programs are available outside the State. Plaintiffs seek declaratory relief, injunctive relief, and costs.

In an amended complaint, the plaintiff, as a representative of her class, is suing three defendants: the State, the State Superintendent of Public Instruction, and a local public school district, individually and as a representative of the whole class. The attorneys could not agree whether the named plaintiff and named defendant public school district were proper representatives, or on the definition of the class of educable retarded plaintiffs or the class of local school districts. They therefore moved for a determination of the classes. Judge Cordon, in mid-November, found the plaintiff to be representative of her class of all educable, handicapped children between the ages of four and twenty that are being denied education at public expense. In addition, he found the public school district to be a fair representative of its class.

> (As an interesting aside, the Judge in this case spoke in open court about the problems that he as a parent had in placing his handicapped children a few years earlier. He asked if any parties desired him to disqualify himself, but none did).

WISCONSIN: Marlega v. Board of School Directors of City of Milwaukee, Civil Action No. 70-C-8 (E.D., Wisconsin).

This is a class action brought on behalf of all students in the City of Milwaukee, Wisconsin. Plaintiffs seek to restrain the public school system from excluding a student for alleged medical reasons without a full, fair, and adequate hearing which meets the requirements of due process of law, to determine if he is medically able to attend school on a full-time basis. The defendants in this case are the Board of School Directors of the City of Milwaukee, Wisconsin and the Superintendent.

After the Court granted a temporary restraining order on January 14, 1970, prohibiting the public school system from excluding the plaintiff from public school for alleged medical reasons without affording him a full and fair hearing which meets requirements of due process of law, the Court extended the relief afforded in the temporary restraining order to all other members of the class. The Court further designated May 12, 1970 as the due date for the proposed plan concerning the handling of medically excluded children to be submitted by the School Board. In March of 1970, the parties stipulated to the terms of the temporary restraining orders.

A stipulation by the parties, which outlined the necessary procedures for excluding a child from the public schools was approved and ordered into effect by the Court in September of 1970. The action was then dismissed without prejudice and without costs to either party. The parties' consent agreement ordered by the Court outlines due process requirements in detail beginning with provisions to ensure notification of parents or guardians that their child is being considered for part-time daily attendance or exemption altogether, and ending with detailed provisions for a formal hearing, required if the parents after being informed of their child's condition refuse to sign a waiver of attendance. The provisions for the formal hearing include the right of the parents to be notified seven days prior to the hearing; the right to be represented by counsel provided by themselves; the right to present evidence and witnesses on their child's behalf; the right to confront and cross-examine any and all witnesses; the right to have the reasons for the committee's recommendation set in writing, together with a summary of all evidence; the right to have the child's school record available to the parents prior to the hearing; the right to have a stenographic record of the hearing and the right to have the committee's finding together with the supporting file submitted to the Board for final action.

This case is closed. In a new case, the Marlega procedures on disciplinary transfers are being modified by a consent decree.

## V. RIGHT TO FAIR CLASSIFICATION

CALIFORNIA: Larry P., M.S., M.J., et al., v. Riles, et al. Civil Action No. C-71-2270 (N.D., California).

This class action was filed on November 18, 1971, on behalf of several named plaintiffs, all black children in California who were wrongly placed and retained in classes for the mentally retarded. All of the named plaintiffs attend elementary schools in the San Francisco Unified School District. The defendants are Wilson Riles, Superintendent of Public Education of California, Members of the State Board of Education, the Superintendent of Schools for the San Francisco Unified School District, and Members of the Board of Education of the San Francisco Unified School District.

The complaint alleges that the plaintiffs and the class they represent have been wrongly placed in classes for the mentally retarded as a result of a testing procedure which fails to recognize their unfamiliarity with the white middle-class culture and which ignores the learning experiences they have had in their homes. This improper placement is further alleged to result in stigma, and a life sentence of illiteracy and public dependency. The

complaint further alleges that this placement procedure violates the Civil Rights Act of 1871 and the right to equal protection, which is found in the California Constitution and the Fourteenth Amendment of the U.S. Constitution which prohibits discrimination based on race or color.

The plaintiffs request the Court to grant the following relief:

1. Enjoin defendants from performing psychological evaluation or assessment of plaintiffs and other black children by using group or individual ability or intelligence tests which do not properly account for the cultural background and experience of the children to whom such tests are administered;

2. Enjoin defendants from placing plaintiffs and other black children in classes for the mentally retarded on the basis of results of such culturally discriminatory tests and testing procedures;

3. Enjoin defendants from retaining plaintiffs and other black children now enrolled in classes for the mentally retarded unless such children are immediately and then annually re-evaluated and retested by means which properly account for the cultural background and experience of the children;

4. Enjoin defendants from refusing to place plaintiffs into regular classrooms with children of comparable age, from refusing to provide them with intensive and supplemental individual training in verbal skills, mathematics, and other areas of the school curricula in order to bring plaintiffs and those similarly situated to the level of achievement of their peers as rapidly as possible;

5. Enjoin defendants from refusing to remove from the school records of these children any and all indications that they were or are mentally retarded or in a class for the mentally retarded. Require defendants to insure that individual children not be identified by results of individual or group I.Q. tests and that such results not be placed in children's school records or reported to classroom teachers or to other faculty or administrators on the school sites;

6. Require defendants to take the necessary action to correct any discriminatory variance and to bring the distribution of black children in classes for the mentally retarded

into close proximity with the distribution of blacks in the total population of the school districts;

7. Require defendants to recruit and employ a sufficient number of black and other minority psychologists and psychometrists in local school districts, on the admission and planning committees of such districts, and as consultants to such districts. Require defendants to make concerted efforts to insure that psychological assessment of black children be conducted and interpreted by persons adequately prepared to consider the cultural background of the child, preferably a person of similar ethnic background as the child being evaluated. Require the State Department of Education in selecting and authorizing tests to be administered to school children throughout the State, to consider the extent to which the testing company has utilized personnel with minority ethnic background and experience in the development of a culturally relevant test;

8. Declare pursuant to the Fourteenth Amendment of the United States Constitution, the Civil Rights Act of 1964, and the Elementary and Secondary Education Act and Regulations, that the the current assignment of plaintiffs and other black students to California mentally retarded classes resulting in excessive segregation of such children into these classes is unlawful and unconstitutional and may not be justified by administration of the currently available I.Q. tests which fail to properly account for the cultural background and experience of black children.

In June 1972, the court entered a preliminary injunction enjoining the State of California from using I.Q. tests for placing black children in classes for the educable mentally retarded. The plaintiffs are presently involved in discovery in preparation for the trial on the request for a permanent injunction. A motion to extend the preliminary injunction will be filed soon to stop all use of I.Q. testing.

LOUISIANA: Lebanks et al. v. Spears et al., Civil Action No. 71-2897 (E.D., La., New Orleans Division).

This is a class action brought by eight black children who are citizens of the Parish of Orleans and have been classified as mentally retarded. Plaintiffs bring this action on behalf of all citizens of the Parish of Orleans who are similarly situated and affected by the practices and policies complained of herein. The defendants are the President of the Orleans Parish School Board; Members of the Orleans Parish School Board; the Superintendent for the Orleans Parish School Board; and the Head of the Special Education Department of the Orleans Parish School.

The complaint alleges that the determinations made by defendants that the plaintiffs and members of their class are mentally retarded are based on neither valid reasons nor ascertainable standards and are made pursuant to tests and procedures that are biased against Negroes, thus violating the plaintiffs' right to education as included in the due process and equal protection clauses of the Fourteenth Amendment. The defendants are also alleged to have violated the plaintiffs' right to equal protection by failing to provide education to the plaintiffs while providing an education to children of higher intelligence; by failing to provide plaintiffs with an education tailored to their needs while providing same to other mentally retarded children; and by failing to provide special education equally to blacks and whites. The complaint also cites violations of the plaintiffs' right to due process in that the defendants have failed to accord plaintiffs hearings to contest defendants' decisions to classify them as mentally retarded and to exclude them from educational programs. The complaint further alleges that the plaintiffs have suffered damages from the refusal by the defendants to give the plaintiffs an education.

The plaintiffs seek the following relief:

1. That the Court award each plaintiff $20,000.00 as damages;

2. That the Court enter declaratory judgment and preliminary and permanent injunctions enjoining the defendants from:

   a. Classifying the plaintiffs and members of their class as mentally retarded pursuant to procedures and standards that are arbitrary, capricious, and biased;

   b. Denying the plaintiffs and members of their class the opportunity to receive a special education geared to their special needs;

   c. Denying the plaintiffs and members of their class the opportunity to receive any education;

   d. Discriminating, in the allocation of opportunities for special education, between plaintiffs, and other black retarded children, and white retarded children;

   e. Classifying plaintiffs and members of their class as retarded without first affording a full, fair, and adequate hearing which meets the requirements of due process of law;

f. Excluding plaintiffs and members of their class from the public schools without first affording a full, fair, and adequate hearing which meets the requirements of due process of law;

g. Excluding plaintiffs and members of their class from special education classes without first affording a full, fair, and adequate hearing which meets the requirements of due process of law.

In June, plaintiffs amended this complaint to include the Louisiana Department of Hospitals and the Louisiana Department of Education. In turn, these two new defendants filed a third-party complaint against the United States Department of HEW and the United States Commissioner of Education alleging that the Federal Government has the primary duty to accord to all United States children an education suited to their needs. This complaint is based both upon the due process and general welfare clauses of the U.S. Constitution, Title I of the Elementary and Secondary Education Act, and the new defendant's position that Title 1 violates the Due Process Clause and the Fifth Amendment on equal protection grounds. The trial was set for November but upon the request of defendants was continued until April 1973.

MASSACHUSETTS: Stewart et. al. v. Philips et al., Civil Action No. 70-1199-F (D. Massachusetts).

This suit attacks the classification methods employed by the Boston school system for placing mentally retarded children in special education classes. The seven named plaintiffs, found to be not retarded by independent psychological evaluations, were all placed in retarded classes on the basis of a single IQ test. The suit alleges that irreparable harm has been caused by the stigma and by the nature of the instruction given. The remedies sought are damages and the establishment of a Commission on Individual Education Needs. Made up of public organizations, private organizations and parents, the commission would oversee a proposed testing procedure detailed in the complaint. All children presently in special education classes would be retested.

The original judge in this case has retired, and the time for discovery under his order has expired. Now pending before the new judge are motions to enlarge the time for discover', for dismissal, and for summary judgment. Boston is claiming that new regulations have settled the case, but the plaintiffs are not satisfied with the implementation of these regulations.

VI. CUSTODY

IOWA: In the interest of Joyce McDonald, Melissa McDonald, Children, and the State of Iowa v. David McDonald and Diane McDonald, Civil Action No. 128/55162 (Iowa Supreme Court, October 18, 1972); and

In the interest of George Franklin Alsager et al. and the State of Iowa v. Mr. and Mrs. Alsager, Civil Action No. 169/55148 (Supreme Court of Iowa, October 18, 1972).

These two cases open up the new subject matter category of child custody problems for "mental retardation and the law." In the McDonald case, David McDonald, 24, and his wife Diane, 21, were adjudged unfit to care for their four year old twins, Melissa and Joyce. The Iowa Supreme Court ruled that these twin girls should be taken from their parents because the mother's intelligence quotient was so low that she could not give them proper care. In so doing, the Iowa Supreme Court upheld a decision by the Scott County Juvenile Court of August 1970 which separated the parents from their daughters.

A Scott County juvenile probation officer had filed a petition in which it was alleged the relationship should be terminated as the parents were unfit by reasons of conduct found by the juvenile court likely to be detrimental to the physical or mental health or morals of children as defined in Section 232.41(2) and (d) of the Iowa Code, and for the further reason that following an adjudication of dependency, reasonable efforts under the direction of the court had failed to correct the conditions leading to the termination.

After hearing evidentiary testimony, the Juvenile Court found that Mrs. McDonald could not provide the twins "the stimulation in her home that they must have to grow and develop into normal, healthy children." Intelligence tests given the parents by Davenport school officials indicated that the husband had an I.Q. of 74 and the wife had an I.Q. of 47. The twins, who have lived in foster homes since they were about seven months old, were also tested and were found to be not retarded. Lower court testimony by nurses and social workers who had visited the McDonald home before the girls were placed with foster parents indicated that the twins were then "pale" and just "unresponsive." These witnesses testified that while Mrs. McDonald could handle the bathing and feeding of her children, they doubted whether she could make decisions on whether they were ill. Witnesses further testified that Mrs. McDonald had a lack of concern about the twins, but that this was not true of the husband. The McDonald's attorney argued that no evidence was presented that the parents were guilty of immoral conduct, intoxication, habitual use of narcotic drugs or other habits that were likely to be detrimental to the children.

But the Supreme Court found that the primary consideration in such a custody hearing is the welfare and best interests of the children, and that the presumption that the best interests of children are served by leaving them with their parents have been rebutted in this case. The eight justices of the Iowa Supreme Court who sat on this case en banc concurred unanimously in the decision, which held that the State "has the duty to see that every child within its borders receives proper care and treatment." The court's opinion made no further comment on what it would consider a proper parent-child relationship or upon the role which the State should assume in measuring the fitness of parents to provide "proper care and treatment."

The McDonald opinion appears to involve some misconceptions about the nature of mental retardation and also raises some vexing policy considerations. The Iowa Supreme Court, for instance, relied upon testimony of Mrs. Clanton, a deputy probation officer, before the juvenile court that evaluation tests administered to the children "disclosed the children were not retarded but needed love and affection and would probably regress if placed back in the original home." According to the Iowa Supreme Court, "it was Mrs. Clanton's opinion that a person with a low I.Q. did not have the same capacity to love and show affection as a person of normal intelligence." The writer knows of no "evaluation" test which is constructed to disclose whether a mentally retarded person would "probably regress if placed back in the original home" and also questions the generalization that a person with a low I.Q. does not have the same capacity to show love and affection as a person of normal intelligence. Also troubling is the court's failure to consider less drastic alternatives to separating the children from their parents and offering them for adoption. According to the Iowa Supreme Court, "as the witness David repeatedly expressed the desire to have the twins returned to him and his wife. He testified he had had experience in bathing and feeding small children and declared a willingness to help with the children in the evening after coming home from work. He told of an arrangement made with a 25 year old lady who lives across the hall from his apartment to help take care of the twins and a third child born to this marriage for the first few months in order to get the children on schedule and assist his wife and teach her how to care for the children in the event the children were returned to the McDonald home." Fundamental issues raised by this opinion are the nature and limits of a State's right and obligation to scrutinize and separate a family as "parens patriae" when such powers may conflict with the parents' right to privacy and with the presumption that parents and not the State will raise children and make basic decisions about the child's best interest.

On the same day as it decided the McDonald case, the Iowa Supreme Court also decided the Alsager case, in which it upheld an earlier ruling by the Cook County juvenile court which took protective custody of the Alsager's five children. The juvenile court held that "while the Alsagers do love their children, neither have the capacity nor training nor willingness to learn to understand the needs of children." The Iowa Supreme Court held "the material facts can be said to be identical (with those of the McDonald case) except to add the finding that the tragic deficiencies of both families in this case appears to have resulted in more harm to the children . . We are precluded from attempting to achieve a justice as desired by the unfortunate parents by working a cruel injustice on the children."

VII. COMMITMENT LAWS

INDIANA: Jackson v. Indiana, 406 U.S. 715 (1972).

Petitioner in this case was a 27-year-old deaf mute with a mental age of three to four years. Four years ago, he was accused of robbing $9.00 in separate robberies. He has denied the charges, and has never been brought to trial because he was found to be incompetent and unable to assist in his own defense. For almost three years, he has been confined in a state mental institution. His compulsory hospitalization, which because of the nature of his condition, would probably have been for life, was accomplished under standards less rigorous than the ordinary civil commitment in Indiana. This occurred simply because of his incompetency to stand trial on the charges filed against him.

The petitioner contended that his confinement under these conditions deprived him of the equal protection of the laws, of his right to bail, and of his right to a speedy trial.

Oral argument was heard before the Supreme Court on November 18, 1971. The written decision is now down and reads in part as follows:

> "We hold, consequently, that a person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant. Furthermore, even if it is determined that the defendant probably soon will be unable

to stand trial, his continued commitment must be justified by progress toward that goal."

The Court specifically held that subjecting petitioner Jackson to a more lenient commitment standard and to a more stringent standard of release than those generally applicable to all others not charged with offenses, deprived him of equal protection of the laws under the Fourteenth Amendment. The Court held further that Indiana's indefinite commitment of a criminal defendant solely on account of his incompetency to stand trial does not square with the Fourteenth Amendment's guarantee of due process.

The Court's opinion is especially notable for its call for closer scrutiny of the commitment process. The opinion notes that the substantive limitations on the exercise of the commitment power and procedures for invoking it vary drastically among the States. The Court then goes on to note:

"The particular fashion in which the power is exercised--for instance, through various forms of civil commitment, defective delinquency laws, sexual psychopath laws, commitment of persons acquitted by reason of insanity--reflects different combinations of distinct bases for commitment sought to be vindicated. The cases that have been articulated include dangerousness to self, dangerousness to others, and the need for care or treatment or training. Considering the number of persons affected, it is perhaps remarkable that the substantive constitutional limitations on this power have not been more frequently litigated."

## APPENDIX

### A. IMPORTANT RECENT PUBLICATIONS ON THE CIVIL RIGHTS OF THE MENTALLY RETARDED

Three new important references, not listed in the bibliographies which follow in this issue, are now available to the interested mental health advocate:

Basic Rights of the Mentally Handicapped[1/] developed by the Mental Health Law Project, focuses on three rights: right to treatment; right to compensation for institution-maintaining labor; and right to education. The 123 page booklet demonstrates how and why litigation can be a useful tool for vindicating these rights.

"An Essay on the Legal Rights of the Mentally Retarded," by Dennis E. Haggerty, et al., appears in The Family Law Quarterly, Vol. 6, No. 1, Spring 1972. It provides a brief discussion of the civil and criminal rights of the mentally retarded.

"Civil Rights of the Mentally Retarded: Some Critical Issues," by Charles W. Murdock appears in Notre Dame Lawyer, October 1972, Vol. 48, p. 133. The article discusses guardianship, institutionalization and education as they affect the rights of the mentally retarded.

1/ Basic Rights of the Mentally Handicapped may be purchased on a prepaid basis for $1.25. All orders should be sent to the National Association of Mental Health, 1800 Kent Street, Arlington, Virginia 22209.

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From p. 17--The Principle of Normalization in Human Services, Wolf Wolfensberger, National Institute on Mental Retardation, 1972, Toronto, Canada

NIMR
York University Campus
4700 Keele Street
Downsview, Toronto, Canada

B. RIGHT TO TREATMENT - SELECTED BIBLIOGRAPHY


Bazelon, David L., "Implementing the Right to Treatment," The University of Chicago Law Review, Vol. 36, p. 742, 1969.

Burris, Donald S., (Ed.), "The Right to Treatment," A Symposium, reprinted from the Georgetown Law Journal, Vol. 57, March 1969.

Chambers, David L., "Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives," Michigan Law Review, Vol. 70, No. 6, May 1972.

"Civil Restraint, Mental Illness and the Right to Treatment," Yale Law Journal, Vol. 77, p. 87.

Constitutional Rights of the Mentally Ill, Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, 91st Congress, November 1969 and August 1970.

Ennis, Bruce, Prisoners of Psychiatry: Mental Patients, Psychiatrists, and the Law, Harcourt Brace Jovanovich, Inc., New York, 1972.

"Law and Psychiatry," A Symposium, The American Criminal Law Review, Vol. 10, No. 3, 1972, published by the American Bar Association.

Rivera, Geraldo, Willowbrook: A Report on How It Is and Why It Doesn't Have To Be That Way," Vintage Books, New York, 1972 (paperback).

"The Administration of Psychiatric Justice: Theory and Practice in Arizona," Special Project, Arizona Law Review, Vol. 13, No. 1, 1971.

C. RIGHT TO AN EDUCATION - SELECTED ANNOTATED BIBLIOGRAPHY

1. Abeson, Alan, "Movement and Momentum: Government and the Education of Handicapped Children," Law Review, Exceptional Children, September 1972[1].
   Article gives a brief synopsis of recent activities which are reshaping educational opportunities for handicapped children, including new state and federal legislation, major attorney generals' rulings, major court decisions, and public awareness.

2. Abeson, Alan and Weintraub, Federick J., "State Law for the Handicapped -- Essential Ingredients," Compact, August, 1971[2].
   Brief analysis of the relationship between different types of mandatory school laws and the development of programs for handicapped children.

3. "Ability Grouping in Public Schools: A Threat to Equal Protection?" Connecticut Law Review, 1:150, June 1968.
   Discussion of why the court in Hobson v. Hansen was incorrect in concluding that ability grouping on the basis of aptitude test scores is a denial of equal educational opportunity to the disadvantaged black.

4. Blatt, Burt, "Public Policy and the Education of Children with Special Needs," Exceptional Children, March 1972[1].
   In the context of current legislation and models for special education, article discusses the right to a public education in terms of labeling and stigma, current programs, standards and accountability, grass roots involvement, and the effective coordination of community resources.

5. Coleman, James, "The Concept of Equality of Educational Opportunity," Harvard Educational Review, 38(1), 1968, p. 7.
   Traces evolutionary shifts in interpretation of the concept of "equality of educational opportunity," discussing what it has meant in the past, what it means now and what it is likely to mean in the future.

6. "Compulsory Education in the U.S.: Big Brother Goes to School," Comments, Seton Hall Law Review, 3:349, Spring 1972.
   Article discusses the educational system and the conflict between individual rights and administrative expediency. In particular, it focuses on compulsory education in terms of state power, decriminalization of the school laws, uniform appointment of guardians for the protection of children's rights, etc.

7. Dunn, Lloyd M., "Special Education for the Mildly Retarded -- Is Much of It Justifiable?" Exceptional Children, September 1968[1/].

Examines the present form of special education programs and provides a blueprint for change. Article takes position that current special education programs are obsolete and violate students' civil rights as well as raising serious educational questions.

8. "Equality of Educational Opportunity: Are Compensatory Programs Constitutionally Required?" Southern California Law Review, 42:146, Fall 1968.

Article focuses on the issue of whether local school districts can be judicially required to apply for and initiate compensatory programs under the mandate of the equal protection clause.

9. Ross, Sterling L., Jr.; DeYoung, Henry; and Cohen, Julius S., "Confrontation: Special Placement and the Law," Exceptional Children, September 1971[1/].

Discussion of a number of major law suits brought against public schools with regard to labeling, testing procedures, and the effectiveness and harmfulness of special class programming for the educable mentally retarded.

10. Weintraub, Federick J., "Recent Influences of Law Regarding the Identification and Educational Placement of Children," Focus on Exceptional Children, Vol. 4, #2, April 1972[3/].

Reviews the historical, philosophical and major legal developments pertaining to the identification and placement of children in special classes and the implications of these developments.

11. Weintraub, Federick J., & Abeson, Alan, "Appropriate Education for All Handicapped Children: A Growing Issue," Syracuse Law Review, to be published.

Article discusses some of the major legal developments regarding appropriate educational placement, and the implications of these developments for increasing the educational opportunities of handicapped children.

12. Weintraub, Federick J.; Abeson, Alan; and Braddock, David, State Law and Education of Handicapped Children: Issues and Recommendations, Council for Exceptional Children, October 1971[4/].

The book is designed as a guide to those seeking legal change in the area of educational opportunities for handicapped children. It includes a general discussion of the

right to an education, identification and placement, administrative responsibilitiea, and a model statute for special legal provisions that handicapped children need.

13. Holliday, Albert E., "Implementing Education for Retarded Children," Pennsylvania Education, May-June 1972, Vol. 3, #5, pp. 10-15 5/.

14. Han, Em, "Special Miseducation--The Politics of Special Education," Inequality in Education, Nos. 3 and 4, Harvard Center for Law and Education, pp. 17-27.

15. "The Pennsylvania Court Orders," The Exceptional Parent, December/January 1972, pp. 18-22.

1/ Single copies of reprints of articles from Exceptional Children are available from the Council for Exceptional Children Information Center, 1411 S. Jefferson Davis Highway, Suite 900, Arlington, Virginia 22202.

2/ Single copies of this article are available from the State Information Clearinghouse for Exceptional Children, CEC Information Center, 1411 S. Jefferson Davis Highway, Suite 900, Arlington, Virginia 22202.

3/ Single copies of this publication are available from Focus for Exceptional Children, 6635 E. Villanova Place, Denver, Colorado 80222, Price $.80.

4/ Copies may be purchased from the Council for Exceptional Children, 1411 S. Jefferson Davis Highway, Suite 900, Arlington, Virginia 22202, Price $3.25.

5/ Published by the Pennsylvania Department of Education, Education Building, Box 911, Harrisburg, Pennsylvania 17126.

## GLOSSARY

amicus curiae - an individual or organization, neither plaintiff nor defendant, which, because of its expertise or interest, is allowed to become involved in the case as a "friend of the court." The involvement usually consists of submitting a brief containing supporting legal arguments to the court. Under extraordinary circumstances, the right to actually participate in the case and to present evidence and cross-examine witnesses can be granted, as was done in Wyatt v. Stickney, the landmark right-to-treatment case won in Alabama.

appeal - the process whereby a court of appeals reviews the record or written materials from a trial court proceeding to determine if errors were made which might lead to a reversal of the trial court's decision. If substantial errors are not found, the trial court's decision will be affirmed.

cause of action - a cause of action is the occurrence which has resulted in injury to one of a plaintiff's legally protected interests. A case is made up of one or more causes of action.

civil case or suit - a case brought by one or more individuals to seek redress of some legal injury (or aspect of an injury) for which there are civil (non-criminal) remedies. Most right-to-treatment and right-to-education cases are civil, such as Wyatt v. Stickney and Mills v. District of Columbia.

class action - a case brought on behalf of both the plaintiffs who are actually named in the suit and of all other persons similarly situated, to vindicate their legally protected interests. The Mills v. District of Columbia case was brought on behalf of 12-year-old Peter Mills and six other school-age children who were named in the complaint, as well as all other exceptional children now residing in the District or those who will be living there in the future.

complaint - a legal document submitted to the court by potential plaintiffs in which they inform the court and the defendants that they are bringing a lawsuit and set out the underlying causes of action.

consent agreement - an out-of-court agreement reached by the parties to a suit, which may be formally approved by the court. In Pennsylvania Association for Retarded Children v. Pennsylvania, a Pennsylvania court ordered that all mentally retarded children be given access to a free public program of education appropriate to their learning capabilities, pursuant to a consent agreement worked out between plaintiffs and defendants.

constitutional right - a legal right which is based on the United States Constitution or on a state constitution. Equal protection and due process of law are constitutional rights.

court systems - there are two court structures in the United States: the federal courts (consisting mainly of federal district courts where cases are tried, the U.S. Courts of Appeal for the 11 circuits or areas of the country, and the U.S. Supreme Court) and the state courts (consisting of trial-level courts called by various names, and one or two levels of appeals courts, depending on the size of the state and its caseload). Decisions by the highest court in a state are reviewable by the U.S. Supreme Court.

criminal suit - a case brought by a public prosecutor against someone who is alleged to have committed a wrong for which there are statutory criminal penalties.

damages - money awarded by a court to someone who has been injured (the plaintiff) and which must be paid by the one who is responsible for the injury (the defendant). Normal damages are awarded when the injury is judged to be slight; compensatory damages are awarded to repay or compensate the injured person for the injury incurred, such as medical expenses, pain and suffering, and mental anguish; and punitive damages are awarded when the injury is judged to have been committed maliciously or in wanton disregard of the injured plaintiff's interests.

declaratory relief - a remedy granted by a court where the court declares or finds that plaintiffs have certain rights. A request for declaratory relief is usually coupled with a request for injunctive relief where the court orders defendants to take or refrain from taking certain actions.

defendant - the person against whom an action is brought because he is allegedly responsible for violation of one or more of a plaintiff's legally protected interests. The defendants in the Mills right-to-education case included the Board of Education of the District of Columbia and its members, the Superintendent of Schools for the District and subordinate school officials, the Mayor and certain subordinate officials, and the District of Columbia.

defense - a reason cited by a defendant why a complaint against him is without merit or why he is not responsible for the injury or violation of rights as alleged by the plaintiff. A defense might be that his actions were privileged, or that the plaintiff consented to the action, or even that procedural rules for bringing the suit against him were not properly followed.

discovery - the process by which one party to a civil suit can find out about matters which are relevant to his case, including information about what evidence the other side has, what witnesses will be called and so on. There are several discovery devices for obtaining information: depositions and interrogatories to obtain testimony, requests for documents or other tangibles, or requests for physical or mental examinations.

due process of law - a right to have any law applied reasonable and with sufficient safeguards, such as hearings and notice, to insure that an individual is dealt with fairly. Due process is guaranteed under the Fifth and Fourteenth Amendments to the U.S. Constitution. In Mills v. District of Columbia, the judge held that due process of law requires a hearing prior to exclusion, termination or classification of a student into a special program.

equal protection of law - a right not to be discriminated against for any unjustifiable reason, such as because of race or handicap. Equal protection is guaranteed under the Fourteenth Amendment.

expert witness - a person called to testify because he has a recognized competence in an area. For example, one expert in the Mills right-to-education case had a doctorate in the field of special education, was an author of numerous professional publications pertaining to exceptional children, and was a consultant to prestigious advisory committees involving education.

injunctive relief - a remedy granted by the court forbidding or requiring some action by the defendant. Injunctive relief includes temporary restraining orders, and preliminary and final injunctions. The difference among these types of relief is that they are issued for varying lengths of time, at various stages of the litigation process and on the basis of varying degrees of proof.

judgment - an order by a judge after a verdict has been reached which sets out what relief is to be granted to the winning side. For example, in the Mills case, the judge required the District of Columbia Board of Education to provide an appropriate publicly supported education to every exceptional child and set out elaborate hearing procedures, among other relief which was granted.

motions - a request to the court to take some action or to request the opposing side to take some action relating to a case. Motions generally relate to pre-trial or trial procedures, such as a motion for a more definitive statement, a motion to dismiss the case, etc.

next friend - a person who represents the interests of a minor or an incompetent in a legal action. A next friend or guardian ad litem is usually a parent or guardian but may be an important person in the community or an interested organization. In Mills, U.S. Congressman Ronald Dellums; the Reverend Fred Taylor, a clergyman; the Director of FLOC (For Love of Children), an organization seeking to alleviate the plight of homeless and dependent children in the District; and the District's Welfare Rights Organization represented some of the named plaintiffs as next friends.

plaintiff - a person who brings a suit in court in the belief that one or more of his legal rights have been violated or that he has suffered legal injury.

pleadings - a term which encompasses all of the preliminary steps of complaint-answer-replies used to narrow a case down to the basic issues of law and fact. It is also used more specifically to refer to a plaintiff setting forth his cause of action and the relief which he is requesting from the court.

precedent - a decision by a judge or court which serves as a rule or guide to support other judges in deciding future cases involving similar or analogous legal questions. In Mills, the judge cited some famous education decisions as precedents, including Brown v. Board of Education, outlawing segregated schools, and Hobson v. Hansen, outlawing the track system in the District of Columbia. Mills can now be cited as precedent by other courts for finding a constitutional right to education.

private action - a case brought on behalf of one or more individuals to vindicate violation of their legally protected interests. As distinguished from a class action, where the relief will apply to all persons similarly situated or within the class represented by the plaintiffs, any relief granted in a private action applies only to those plaintiffs actually before the court.

procedural right - a right relating to the process of enforcing substantive rights or to obtaining relief, such as the right to a hearing, the right to present evidence in one's defense, or the right to counsel.

relief - a remedy for some legal wrong. Relief is requested by a plaintiff, to be granted by a court, against a defendant. For example, in Wyatt v. Stickney, as part of the relief, the court set standards for minimum constitutionally and medically adequate treatment at state hospitals in Alabama.

settlement - an out-of-court agreement among parties to a suit, which resolves some or all of the issues involved in a case.

statutory right - a right based on a statute or law passed by a unit of federal, state or local government. The Fair Labor Standards Act is a federal statute establishing a right to a minimum wage for certain categories of workers, including, by amendment, patients institutionalized in state hospitals and schools for the mentally retarded.

substantive right - an essential right such as the right to free speech and religion or to be free from involuntary servitude, usually found in the Bill of Rights.

test case - a case brought to establish a legal principle, as well as to vindicate rights of the parties involved in the specific case. Once principles are established in one court, they can be cited as precedent for decisions by other judges or other courts. Wyatt v. Stickney is now a precedent for other judges to find a constitutional right to treatment.

tort - a civil wrong for which a private individual may recover money damages. Torts include, for example, assault and battery, intentional infliction of mental distress, false imprisonment and invasion of privacy.

verdict - a decision by a judge or jury in favor of one side or the other in a case.